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70-73

STATE OF ILLINOIS

PEOPLE VS. JOSEPH T. MAHLE



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at
Ottawa, on the 1st Day of January in the Year of our Lord
one thousand nine hundred and seventy-two, within and
for the Third District of Illinois:

Present—

HONORABLE ALLAN L. STODER, Presiding Justice

*HONORABLE JAY J. ALLOY, Justice

HONORABLE ALBERT SCOTT, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff



BE IT REMEMBERED, that afterwards on

NOVEMBER 22, 1972

_____ the Opinion of the
Court was filed in the Clerk's Office of said Court, in the
words and figures following, viz:

In The
APPELLATE COURT OF ILLINOIS
Third District
A. D. 1972.

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	LaSalle County
)	
v.)	
	)	Honorable
JOSEPH T. MAHLE,	)	Leonard Hoffman
	)	Presiding Judge
Defendant-Appellant.)	

Mr. JUSTICE ALLOY delivered the opinion of the court: **Abstract**

Joseph T. Mahle pleaded guilty in the Circuit Court of LaSalle County to three Informations, two of which charged him with Deceptive Practices, and the third, with Violation of Bail Bond. It appears that defendant Mahle, after entering a plea of not guilty to the first Information in March of 1968, violated the terms of his bail bond by leaving the State and was arrested in Tennessee. He was again released on bond on August 29, 1969. In January of 1969 he was charged with Deceptive Practices in the second Information for six more bad checks which he had written. At the time of trial, he was also charged in Kendall County with deceptive practices. Mahle appeals at this time from his conviction on each of the eight counts of deceptive practices (pursuant to Ill. Rev. Stat., ch. 38, sec. 17-1) and Mahle likewise complains of the sentence which was imposed as a result of those convictions.

After defendant's plea of guilty to the eight counts of both Informations and to the additional Information charging him with violation of bail bond,

the trial court sentenced defendant to serve five-years probation on the Deceptive Practices conviction, with the first year to be served at the State Penal Farm at Vandalia. He was also to pay costs, and to make restitution of the moneys he had illegally received. The court likewise sentenced defendant on the bail bond conviction to serve one year at the penal farm, to be served concurrently with the period of incarceration for the Deceptive Practices conviction.

On appeal in this court, defendant contends, first, that the Deceptive Practices Informations were fatally defective because they failed to identify any entities which were capable, as a matter of law, of having been victims of the alleged offenses. Each separate count of the six counts of the second Deceptive Practices Information alleged that defendant committed the deceptive practice by uttering six separate drafts with the intent to obtain control over property of "Marmion's Sinclair Service, Ottawa, Illinois." The two counts of the first Deceptive Practices Information alleged that defendant's commission of deceptive practices consisted of uttering two drafts, with the intent to obtain control over the property, respectively, of "Streator Car Wash, Streator, Illinois," and "J. C. Morrow, Yorkville, Illinois."

The section with which we are concerned (Ill. Rev. Stat. 1969, ch. 38, sec. 17-1(d).), provides that a person can commit a deceptive practice with intent to defraud if:

"(d) With intent to obtain control over property or to pay for property, labor or services of another he issues or delivers a check or other order upon a real or fictitious depository for the payment of money, knowing that it will not be paid by the depository." (emphasis added)

It is argued by defendant, that each count of the two Deceptive Practices Informations was fatally defective because each failed sufficiently

to identify who was the one to be described as "another" who was presumably defrauded. This issue was raised for the first time on appeal. The essence of the objection is that the State failed sufficiently to identify the victim of the offense charged. The People argue that defendant waived this issue when he tendered his plea of guilty. Defendant, however, contends that the informations failed to comply with minimal requirements prescribed by section 111-3 of chapter 38 of Illinois Revised Statutes. If all the informations were deficient, as defendant contends, then a conviction based upon such informations would be fatally defective, even though defendant might have pleaded guilty thereto, and even though the objection thereto might have been first interposed on appeal. People v. Heard, 47 Ill. 2d 501, 266 N.E. 2d 340, 343; People v. Dzielski, 130 Ill. App. 2d 581, 264 N.E. 2d 426, 428.

An information would be deemed sufficient under section 111-3 referred to if it would have (1) enabled the defendant to prepare his defense and (2) sustained a plea of conviction or acquittal as a bar to any further prosecution for the same offense as a result of the same conduct. People v. Grieco, 44 Ill. 2d 407, 255 N.E. 2d 897-8-9; People v. Bauta, 124 Ill. App. 2d 132, 260 N.E. 2d 306, 309.

We note, particularly, that one of the informations refers to J. C. Morrow, who is certainly to be understood to be an individual. It would not be necessary to add in the information that J. C. Morrow is a person or individual. The word "another" is defined to mean "a person or persons as defined in this Code other than the offenders." (Ill. Rev. Stat., ch. 38, sec. 2-3.) " 'Person' means an individual, public or private corporation, government, partnership or unincorporated association." (Ill. Rev. Stat., ch. 38, sec. 2-15.) Obviously, the challenged count

with respect to the information referring to J. C. Morrow complied with all requirements, even if the contentions raised by defendant were accepted as being sound. The information was sufficient to support the deceptive practices conviction in this cause.

Defendant contends that People v. Hill, 68 Ill. App. 2d 369, 216 N.E. 2d 212, and People v. Tenen, _____ Ill. App. 2d _____, 270 N.E. 2d 179, required that the conviction be set aside for the reason that all the informations were fatally defective in failing to allege identification of any complainant.

While we do not believe that the Hill case and the Tenen case would necessarily require that the conviction be set aside, even if the information referring to J. C. Morrow were not in the case, it is obvious that the judgment of conviction on the count of the information relating to J. C. Morrow alone was proper and that the conviction based on such count should stand.

The second issue raised by defendant involves a contention that the penalty imposed by the court for the deceptive practices conviction exceeded the court's authority to impose such penalty. It is specifically argued that Section 17-1 referred to authorizes a fine of not to exceed \$500 or imprisonment in a penal institution other than a penitentiary for a period of not to exceed one year or both. As we have noted, the trial court in the instant case placed defendant on probation for the offense of deceptive practices and also directed his incarceration for the maximum term of one year permitted by Section 17-1. Defendant was also required to pay court costs and make restitution. It is argued by defendant that the court could not use the device of probation as a guise for imposition of a penalty more severe than would be authorized if probation were not granted.

As we indicated in People v. Watland, _____ Ill. App. _____, 281 N.E. 2d 435, at page 437, the sections of the statute dealing with probation, Section 117-1 and 117-2 of 1969 Illinois Revised Statutes, Ch. 38, expressly provide for allowance of probation for a maximum period of five years, with authority in the court to impose a special condition of incarceration of up to one year in an institution other than a penitentiary. We pointed out in that case that neither of the provisions is necessarily related to the maximum period of incarceration established for individual offenses. We found in the Watland case that the one-year period of incarceration there provided for was not beyond the maximum provided for the offense involved in that case. Similarly, in the cause before us, the one year period of incarceration is not in excess of the maximum period prescribed for the offense. The court, therefore, acted within its authority in imposing the sentence in the cause before us, including the period of probation.

Defendant also urges without citing any basis therefor that the sentence for violation of bail bond be reduced to the time actually served of approximately three months prior to release on bond. We find no basis in the precedents or the record presented in this cause to justify such action by this court as a court of review.

For the reasons outlined in this opinion, the judgment of the Circuit Court of LaSalle County is affirmed.

Judgment affirmed.

Stouder, P. J. and Scott, J. concur.





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PEOPLE OF THE STATE OF)	APPEAL FROM
ILLINOIS,)	
Plaintiff-Appellee,)	CIRCUIT COURT,
)	
vs.	)	COOK COUNTY.
)	
KEVIN PATTERSON (Impleaded),	)	HON. LOUIS B. GARIPPO,
Defendant-Appellant.)	)	Presiding.

MR. JUSTICE BURKE delivered the opinion of the court:

Defendant Patterson was found guilty at a jury trial of the crime of armed robbery and was sentenced to a term of four years to twelve years in the penitentiary. Defendant initially appealed directly to the Supreme Court pursuant to Rule 302 (a) (2). Ill.Rev. Stat. 1969, ch. 110 (A) par.302(a)(2). On November 30, 1971, the appeal was transferred to this court. (People v. Patterson, Ill. Sup.Ct.Doc.No. 43293, November 1971 term).

On May 9, 1969, an armed robbery took place at an ice cream store owned and operated by Eugene Wright at 10219 South Halsted Street, Chicago. An indictment charged the defendant and Sherman Nailor with the armed robbery. A motion for a severance having been allowed, the defendant was tried alone.

Pre-trial motions were filed by defendant seeking the suppression of the physical evidence and also the identification testimony. After a hearing on the motions, the trial judge ruled that the identification made at the second confrontation was obtained under circumstances unnecessarily suggestive and granted defendant's motion to suppress so far as it related to any in-court identification or identification testimony concerning the second confrontation (the facts of which are not relevant to this opinion). The trial judge also ruled that the complainant would be allowed to testify at the

trial as he did at the hearing on the motion to suppress that at the first confrontation the defendant looked like the person who committed the robbery. Thus the motion to suppress identification was sustained in part and denied in part. The motion to suppress the physical evidence was denied.

At the trial Eugene Wright testified for the People that on May 9, 1969, he was the proprietor of an ice cream shop at 10219 South Halsted Street, Chicago. The store had a north and south door through which customers entered and exited and a counter which ran in a north and south direction. He stated that three men walked into the store at approximately 8:45 P.M., but that he paid no particular attention to them initially. He asked to be excused for a minute so that he could wash his hands, and he walked directly to the rear. He was rinsing off his hands when he saw someone standing beside him with a gun. He looked up and immediately saw a gun which was pointed directly at his face. His first reaction was to give the men what they wanted so he turned around, walked to the front, opened the cash register and went to the other side of the store. One man took twenty to twenty-eight dollars from the register and they left by the north door. Mr. Wright testified that he then called the police and gave them a description of the men.

The description given the police by Mr. Wright was as follows: Robber One—Male, Negro, five feet ten inches to six feet tall, large natural (hair style), one hundred and sixty to one hundred and seventy pounds, dark complected, brown leather three-quarter length coat; Robber Two—Male, Negro, five feet ten inches to six feet tall, large natural (hair style), dark complected, dark brown corduroy three-quarter length jacket; Robber Three—Male, Negro,

five feet seven inches tall, dark clothing. All three of the robbers were described as being approximately twenty years old.

The complainant further testified that about five to seven minutes after he called the police they started bringing in suspects. The police brought in from twelve to eighteen or more persons for the complainant to view. The witness testified that he saw defendant Patterson and Sherman Nailor later on that evening and they resembled the men who had robbed him.

Police Officer Melvin Duncan testified for the People that on May 9, 1969, he and his partner, Officer Robert Pierson, arrested defendant. He testified that at approximately 8:45 that evening the officers received a radio message reporting the robbery at 10219 South Halsted Street and giving a description of the robbers.

Officer Duncan further testified that he and his partner arrested defendant Kevin Patterson and Sherman Nailor at 9522 South Eggleston (approximately ten or eleven blocks from the scene of the crime).

Police Officer Robert Pierson testified for the People that immediately after the arrest he conducted an initial search of the defendant. He testified that the gun which was introduced and admitted into evidence as People's Exhibit No. 1 was the same gun he recovered from defendant Patterson at the time of the search. At the time of the initial search defendant also had a wallet in his possession.

After completing the initial search incidental to the arrest, the officers returned to the crime scene with the defendant and Sherman Nailor where a second search was conducted. Officer Pierson testified that at the second search of the defendant he recovered one dollar and seventy-six cents in change (the wallet which



defendant had in his possession at the time of the initial search at the arrest scene was missing). Officer Pierson further testified that prior to completing his tour of duty that night, he found a wallet containing the identification of Kevin Patterson in the back seat of the police car. Six one-dollar bills were taken from the wallet and inventoried as police exhibits and the wallet was returned to the defendant.

Sherman Nailor, as a witness for the People, testified that on May 9, 1969, he met Kevin Patterson and one Benny Baggett (alleged to be the third robber but who at the time of the trial remained unapprehended) at 98th and Wallace Street, Chicago. They decided to rob someone and just before they entered the complainant's ice cream store, defendant Patterson produced a .38 caliber revolver which the witness identified as being the same revolver introduced and admitted in evidence as People's Exhibit No. 1 at the trial. Nailor testified that they went in and robbed the store and that while Patterson had his revolver drawn on the complainant, Nailor himself took about twenty-five dollars from the cash drawer and that Patterson took a small amount of change. The witness then testified that they left the store and proceeded north. Nailor stated that Benny Baggett left them after the money had been split in approximate thirds and that he and defendant Patterson proceeded to 95th and Eggleston where they were arrested by Officers Duncan and Pierson.

The officers searched them and found the gun on defendant. They were then taken in the police car to the ice cream store and confronted by the complainant, Mr. Wright. The witness Nailor testified that during the trip from the arrest scene to the ice cream store, defendant Patterson hid his wallet in the rear seat

of the police car.

The witness further testified on cross-examination that he decided to testify for the People on the advice of his attorney in order to obtain leniency in his own case. He admitted that he was guilty of the robbery.

Defense witness, Teresa Patterson, the defendant's sister testified that she resided with defendant and her parents at 9642 South Lowe Street, Chicago. She testified that on the evening of May 9, 1969, the defendant left the residence at approximately 7:45 P.M., and she did not see her brother return that evening.

Defendant, testifying in his own behalf, stated that on May 9, 1969, he left his home between 6:30 P.M., and 6:45 P.M., and returned home at 7:45 P.M. On direct examination of defendant, the following colloquy took place:

"Mr. Downs [attorney for defendant]: At quarter to 8:00 you were still at home?

Defendant: Yes.

Mr. Downs: When your sister testified you left the house at quarter to 8:00 was she correct?

Defendant: Yes.

Mr. Onesto [ass't state's att'y]: Objection, impeaching his own witness.

The Court: He said yes.

Mr. Downs: Was she correct when she said you left at quarter to 8:00?

Defendant: Yes.

Mr. Downs: Were you home at quarter to 8:00 or weren't you?

Defendant: I was.

Mr. Downs: When she said you left the house at quarter to was she correct?

Defendant: No, she wasn't.

Mr. Onesto: Object to that, ask it be stricken.

Mr. Downs: What time did you leave?

The Court: The answer will stand.

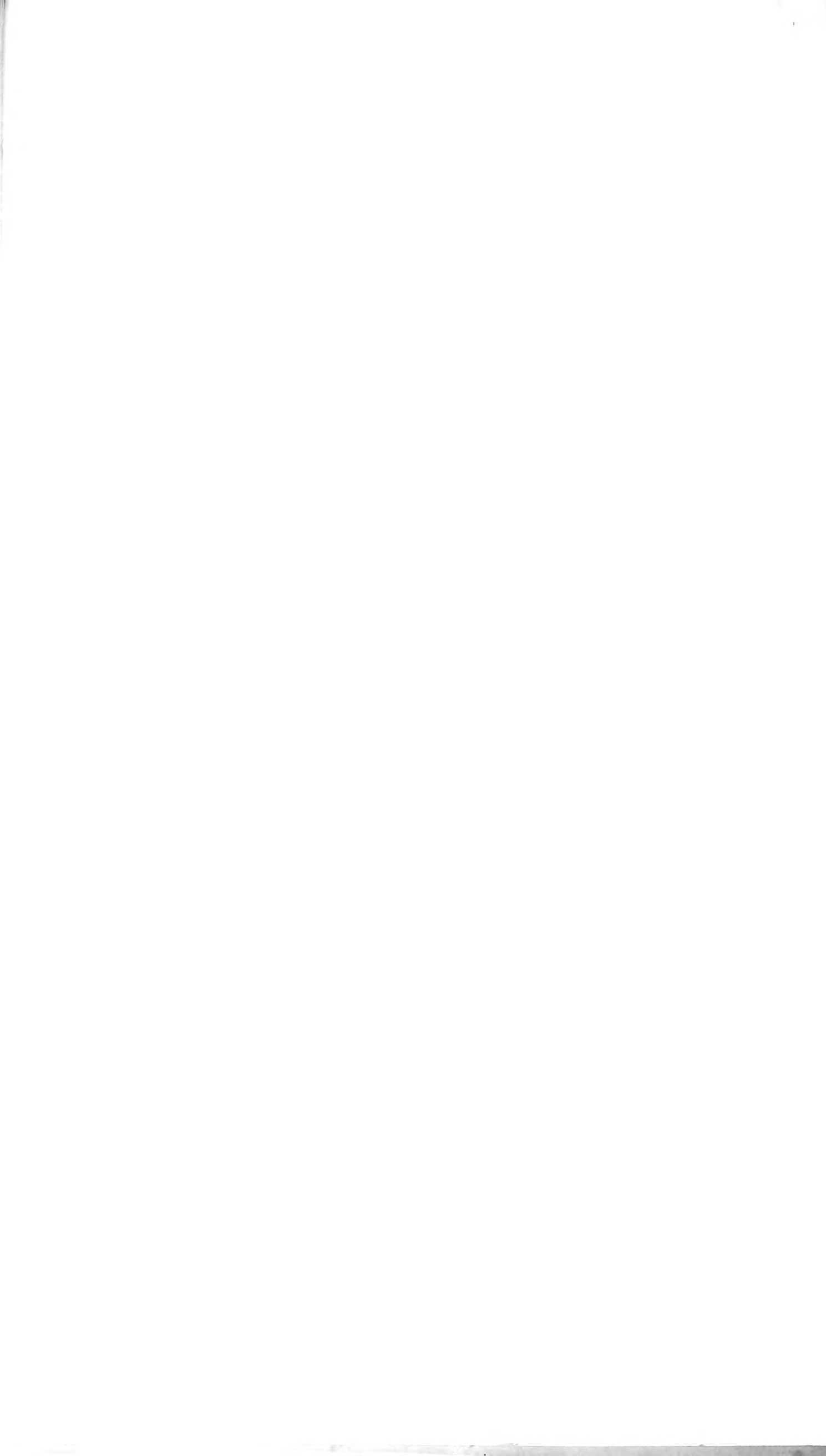
Mr. Downs: What time did you leave the house?

Defendant: About twenty minutes to 10:00."

Defendant further testified that when he left the house allegedly at 9:40 P.M., he was on his way to see his girlfriend when he met Sherman Nailor in the park. He and Nailor talked for a while and then Patterson stopped for two or three minutes at his girlfriend's house. He and Nailor proceeded on and during their conversation, Nailor mentioned that he and several others had robbed an ice cream store earlier. When the pair reached 95th and Eggleston, they were arrested by officers Duncan and Pierson. Defendant testified that he did not rob the ice cream store and that the revolver (People's Exhibit No. 1) did not belong to him and was not on his person and that the first time he saw the revolver was after his arrest. He stated that he did not hide his wallet in the rear of the police car.

On cross-examination defendant testified that both police officers and Sherman Nailor were incorrect when they testified that a revolver was taken from defendant after his arrest. He further testified that his sister, who was called as a defense witness and testified on defendant's behalf, was "nervous" and "incorrect" when she testified that defendant left his home at approximately 7:45 P.M., he persisted in maintaining that he did not leave his home until 9:40 P.M., on the evening of the crime.

The prosecuting attorney, Assistant State's Attorney Anthony J. Onesto was called as a witness by the defense. He testified



that he had indicated to Sherman Nailor's attorney that the People would recommend probation in Nailor's case if Nailor would testify for the State against defendant Patterson.

The jury returned a verdict finding defendant guilty of the crime of armed robbery.

Defendant's first contention is that his arrest was an investigatory detention and unlawful because it was without reasonable basis and therefore the evidence obtained incidental to the arrest should have been suppressed.

An arrest without a warrant is justified when a police officer has reasonable grounds to believe that an offense has been committed and that the person he seeks to arrest is the perpetrator of that offense. Section 107-2(c) of the Code of Criminal Procedure of 1963 (Ill.Rev.Stat. 1969, ch.38, par.107-2(c), *People v. Wright*, 41 Ill.2d 170, 242 N.E.2d 180).

In *People v. Doss*, 44 Ill.2d 541, 256 N.E.2d 753, the Illinois Supreme Court upheld the validity of an arrest without a warrant and stated:

"An arrest by police is authorized without an arrest warrant where officers have reasonable grounds to believe that the person or persons arrested have committed an offense. (Ill. Rev.Stat.1967, ch.38, par.107-2(c); *People v. Wright*, 41 Ill.2d 170, 173, 242 N.E.2d 180.) Reasonable cause does not require evidence sufficient to convict one arrested, but requires only that a reasonable and prudent man having the knowledge possessed by the arresting officer at the time would believe the person had committed an offense. (*People v. Wright*, 41 Ill.2d 170, 242 N.E.2d 180; *People v. McCrimmon*, 37 Ill.2d 40, 224 N.E.2d 822.) Whether there is reasonable cause to arrest will depend on the facts and circumstances. *People v. McCrimmon*, 37 Ill.2d 40, 224 N.E.2d 822; *People v. Davis*, 34 Ill.2d 38, 213 N.E.2d 531; *People v. Jones*, 31 Ill.2d 240, 201 N.E.2d 402.

"Here the defendants and their dress fitted the descriptions of the robbers given by the eyewitnesses of the crime. The officers also had reason to believe that the men they sought were in the Rockford area and did not have an automobile. The

motel manager told the officers that the defendants met the descriptions of the robbers and that they did not have a car. The police had reasonable cause to believe the defendants were the men who had committed the robbery and murder."

In the instant case the trial judge conducted an extensive hearing on defendant's motion to suppress the identification testimony and the physical evidence.

The evidence adduced at this hearing revealed that the police officers received a radio message at approximately 8:45 P.M., on May 9, 1969. The message related that an armed robbery had just occurred at 10219 South Halsted and gave a detailed physical as well as clothing description of the robbers and also their direction of flight from the crime (north). The officers proceeded to patrol the area in search of the robbers and approximately one-half hour later observed defendant Patterson and Sherman Nailor walking north in the vicinity of 95th and Eggleston. The defendant and Nailor substantially matched the detailed description given the officers by the complainant. Additionally, defendant was arrested within thirty minutes after the commission of the crime, within twelve blocks of the scene of the crime and at the time of arrest he was walking in the same direction as the direction of flight given the police by the complainant; namely northbound.

Viewing the totality of the facts known to Officers Duncan and Pierson at the time of the arrest, we believe that the officers did have probable cause to arrest defendant without a warrant and therefore the trial court was correct in its ruling denying defendant's motion to suppress the physical evidence and the identification testimony.

Defendant contends that certain alleged improper testimony was

brought out by the State and was so prejudicial that the alleged errors could not be corrected. Additionally, he maintains that the trial judge decided a question of fact by making a statement concerning the identification of the defendant and thereby usurped the function of the jury. Defendant's contentions are without merit.

We believe that the admissibility of the testimony of which defendant complains, when taken in context of the record, was properly ruled upon by the trial court and was not prejudicial to defendant. Likewise, the trial judge's statement concerning defendant's identification, taken in the context of the record, did not constitute a finding of fact and consequently was not a usurpation of the jury's function.

Defendant contends that the State failed to prove him guilty beyond a reasonable doubt. He argues that the testimony linking him to the crime was vague, uncertain and of highly questionable veracity.

The foregoing summary of the evidence reveals that the State produced a substantial amount of evidence establishing defendant's participation in this crime.

It is well established that it is the function of the jury to weigh testimony, judge the credibility of witnesses and determine factual matters in debatable sets of circumstances. *People v. Nicholls*, 42 Ill.2d 91, 245 N.E.2d 771.

A review of the evidence presented at the trial demonstrates that the defendant was proven guilty beyond a reasonable doubt.

Finally defendant contends that the circumstances surrounding the initial confrontation were unnecessarily suggestive and conducive to irreparable mistaken identification. He argues that the trial

court erred in denying defendant's motion to suppress the identification testimony as to the first tentative identification.

Identification testimony should be suppressed only where it appears from the record that the procedures employed were so unnecessarily suggestive as to give rise to a substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377, 384; *People v. Holiday*, 47 Ill.2d 300, 307-08, 265 N.E.2d 634; *People v. Lee*, 44 Ill.2d 161, 254 N.E.2d 469; *People v. Tuttle*, 3 Ill.App.3d 326, 278 N.E.2d 458. All the facts and circumstances bearing on the pretrial identification must be considered. *People v. Blumenshine*, 42 Ill.2d 508, 250 N.E.2d 152.

In the instant case, the complainant gave the police a detailed description of the robbers. The store where the robbery occurred was well lighted and the robbers were present for several minutes so the complainant had an excellent opportunity to observe. The first tentative identification occurred within one hour of the commission of the crime. The fact that defendant's motion to suppress was granted by the trial court as to the second identification does not vitiate the first tentative identification. Under these circumstances, we do not believe that the identification procedures were so unnecessarily suggestive as to give rise to a substantial likelihood of irreparable misidentification. The trial court did not err in denying defendant's motion to suppress as to the first tentative identification.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG, P.J., and LYONS, J., concur.

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STATE OF ILLINOIS

APPELLATE COURT

9 I.A.³ 177

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE JAMES C. CLEVELAND Presiding Judge

HONORABLE SAMUEL C. SMITH Judge

HONORABLE HAROLD F. BRADY Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 24th day
of January A. D. 1973, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

11/30/12

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Agenda No. 12-277

FOURTH DISTRICT

Defendant-Appellant

[illegible]

The defendant appeals from a judgment of the circuit court of Macon County revoking his probation and sentencing him to a term of one to ten years in the penitentiary. He here asserts that the trial court abused its discretion in revoking his probation and in sentencing him to the one to ten year prison term. Both sides agree that the question of whether to grant a defendant probation or continue a defendant on probation is a matter of discretion with the trial court. We agree. This court stated the principles in *People v. Simpson*, 271 N.E.2d 110, and there stated that we will not

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disturb the findings of the trial court unless the record establishes an abuse of discretion by that court. The record here supplies scant grounds for such a conclusion on our part.

The defendant was admitted to probation for a period of two years for burglary and was then 17 years old. He was sentenced on the burglary charge and admitted to probation on December 10, 1970. Probation was revoked ten months later for failure to keep the 11 o'clock curfew hour and for contributing to the delinquency of a minor by having sexual intercourse with a 14-year-old girl. The evidence is conclusive that he stayed all night at a friend's house and in the morning the mother of that friend entered the bedroom and there saw the defendant in bed with the bed clothes up to his waist and his chest bare. The 14-year-old girl was in bed with him and her T-shirt and jeans were on the floor. The girl testified that they had intercourse that night and had had intercourse on several other occasions. The defendant's testimony was that he had gone to bed and went to sleep and the girl came in and got in bed with him. A police officer testified to admissions by the defendant that he had sexual relations with the girl and claimed that she had told him she was over 16 years old. She had left home. She told him that she was pregnant - not a fact - and wanted to marry him and yet he continued to go with her. He acknowledged that he had read his probation order, knew that he had promised to return to

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school and yet 10 months later had not done so, nor had he obtained employment and that on several occasions had been out after the curfew hour. His denial of some of the other evidence raises eyebrows when coupled with his conduct as to his credibility. A reading of this record does not come close to establishing an abuse of discretion by the trial court. The sentence imposed as to the minimum was the statutory minimum. The judgment of the trial court should be and it is hereby affirmed.

Judgment affirmed.

Craven, P.J. and Trapp, J. concur.

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) MEL R. JIGANTI,
Defendant-Appellant.) PRESIDING.

MR. JUSTICE DRUCKER delivered the opinion of the court:

Defendant, James Lyons, and William Bielawski were indicted for involuntary manslaughter. Ill. Rev. Stat. 1969, ch. 38, par. 9-3(a). Upon defendant's motion, a severance was granted. Defendant was found guilty by the court sitting without a jury and sentenced to a term of one year to one year and one day. Bielawski testified for the State at defendant's trial. Subsequent to defendant's conviction the charge against Bielawski was dropped.

On appeal defendant contends (1) that the court erroneously admitted two oral statements he made to the police because he was not given the Miranda warnings (Miranda v. Arizona, 384 U.S. 436), or if he was given them he did not voluntarily and knowingly waive his Fifth Amendment rights; (2) that two State witnesses perjured themselves thus depriving him of a fair trial, and as to one of these witnesses, a post-trial hearing should have been held concerning the alleged perjury; (3) that the court erroneously admitted opinion testimony regarding Bielawski's state of sobriety after the accident; and (4) that he was not proven guilty beyond a reasonable doubt.

Since the first issue raised on appeal deals with the propriety of the court's ruling at a pre-trial hearing to suppress oral statements, we would ordinarily set forth the testimony given therein. However, the oddity occurs here that the two admissions sought to be suppressed were not introduced during the State's

case in chief despite the favorable ruling the State had obtained as to their admissibility at the pre-trial hearing. Only one of the two admissions was ever introduced into evidence and this was during the State's case on rebuttal. For reasons to become apparent later in this opinion, a detailed description of the testimony at the hearing is unnecessary.

The testimony at the trial follows.

William Bielawski testified for the State:

On June 4, 1969, at about 6:00 A.M., he was driving his car west on 37th Street in Cicero. The defendant was seated next to him and Patrick Maag was to the right of the defendant. One Block east of Central Avenue (a north-south street) the defendant told Bielawski to "pick up some speed." Bielawski did not respond to the suggestion and the defendant pressed his left foot down on Bielawski's right foot which was on the gas pedal. The car accelerated a few miles per hour. Defendant then took his foot off and told Bielawski to go through a stop sign they were approaching. Defendant again pressed his left foot down on Bielawski's right foot (which was still on the gas pedal) causing the car to accelerate more than before. The car went into "passing gear," went through a stop sign at 37th and Central and hit a car traveling on Central. There are no stop signs at the intersection for cars traveling on Central. Bielawski, the defendant and Maag were taken to the emergency room at MacNeal Hospital. Maag died as a result of the collision.

Around 8:00 or 9:00 A.M. (still on June 4) Bielawski and defendant were placed in beds next to each other in the emergency room, at which time defendant told the witness, "you know Pat's dead. * * * You know we're in big trouble?" Bielawski said nothing but the defendant continued, mentioning that he would get a lawyer from Oak Park. He asked Bielawski to "take the rap" because he (the defendant) had a record.



Several days later Bielawski was in a hospital room he shared with the defendant when police officer James Tierney and another police officer came to question them. He remembered Tierney asking defendant how he was going to "get out of this one?" Defendant answered, "All I am going to - - reaching for my wallet [sic] and I pressed on the gas pedal."

On cross-examination Bielawski testified that he had worked from 11:00 P.M. Monday, June 2, until 7:00 A.M. Tuesday, June 3; he went home and slept until 5:00 P.M. Tuesday. Then he bought four quarts of beer and brought them to a friend's house where he and others sat around, talked and drank beer; he had two glasses of beer. He was 18 years old at the time. He left the friend's house at about 12:00 midnight and went to the defendant's apartment; he brought two quarts of beer with him; he drank three more glasses of beer at defendant's apartment; he estimated his total consumption of beer (from 6:00 P.M. Tuesday until 5:30 A.M. Wednesday) at two quarts. The defendant and Maag drank vodka and soda at defendant's apartment; Bielawski didn't know how much. He saw no one else at the apartment although he thought defendant's mother was sleeping in a bedroom. Defendant left the apartment at 5:30 A.M. or 5:45 A.M. to start Bielawski's car. The car was a 1962 Chevrolet with an automatic transmission. Bielawski denied that he didn't know where the car was parked. Bielawski then left and Maag followed shortly thereafter. They were going to take Maag home. Defendant and Maag gave Bielawski directions because he didn't know where Maag lived. He doesn't remember what route they took to 37th Street; he doesn't believe they went on Laramie or went past his house which is located at 30th Street and Laramie; he really isn't sure how they got to 37th Street because the incident took place about one year ago. At previous times he had driven after drinking two or three quarts of beer. He had been drinking beer when he "felt like it" since he was 14. The beer did not affect him.

He saw no speed signs posted on 37th Street; he went through no stop signs. He always uses his right foot when braking his car. He is six feet tall and weighs 170 pounds. When the defendant put his foot on the witness' foot the second time, the witness just sat there, he was scared. He never used his left foot to brake the car. He didn't see the car on Central until just prior to the collision. He has an attorney and charges are pending against him. His attorney told him he would be tried on July 8. (This testimony was being given on July 1.) He had talked to an Assistant State's Attorney but had been promised nothing in return for his testimony.

James Tierney, a police officer, testified for the State:

He has been a policeman for 20 years. He investigated the scene of the crash. Later at the hospital he saw defendant and Bielawski. During the course of his police work he has had many occasions to observe and arrest people who were under the influence of alcohol. Over defense counsel's objection that the testimony would be irrelevant and immaterial, Tierney stated that he was of the opinion that neither defendant nor Bielawski was under the influence of alcohol when he saw them in the emergency room after the collision. Again over defense counsel's objection Tierney testified that around 6:30 A.M., in a room adjacent to the emergency room, in the presence of Officer Kautsky he informed the defendant of his "Civil Rights." The defendant wanted to know what had happened to Maag. A curtain was removed from an adjacent bed and defendant was shown Maag's body and informed that he was dead. Then the defendant said, "Well I am drunk; I don't remember anything. I am not going to say any more." Tierney stated that



no other conversation took place with defendant on that day.*

Tierney returned to the hospital a few days later to question Bielawski and the defendant; they shared the same hospital room. Officer Ed Mersch accompanied him. Tierney was asked to relate what conversation took place in the room, but the court sustained defense counsel's objection that a proper foundation had not been laid (the time and date of the conversation had not been specified) and the witness was not permitted to respond. Tierney was not cross-examined.

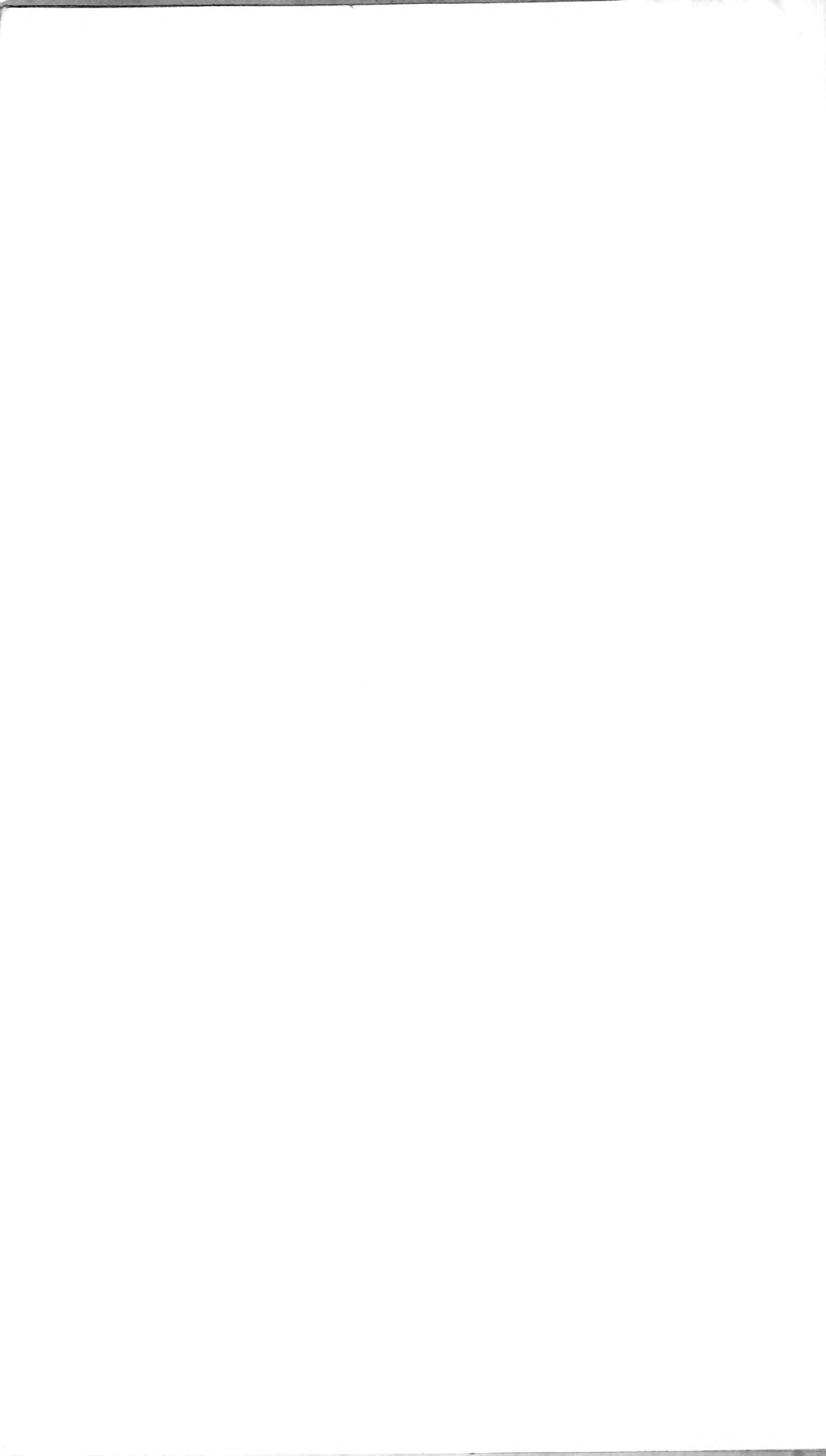
Bruce Lyons, defendant's brother, testified for the defense:

On June 3, 1969, at about 11:30 or 12:00 midnight, he awoke from his sleep to go to the bathroom. While returning to bed there was a knock on the door; he opened it and saw William Bielawski who was holding a bag with bottles "jangling" in it. He believed there were more than two bottles in the bag. On cross-examination Lyons stated that his brother was not drunk; his brother does not drink; that the following morning, June 4, he saw four bottles on the kitchen table.

James Lyons, defendant, testified in his own behalf:

During June 1969 he lived at 1615 51st Court in Cicero; 51st Court is a one-way street going south; it is one-half block from Laramie. On June 3 Patrick Maag came to his apartment at

* When Tierney was questioned at the pre-trial hearing as to what occurred in the emergency room, he testified that he gave defendant the Miranda warnings and then asked him, "What took place over there?" The defendant answered that he wasn't going to make any more statements until he knew about Maag's condition. Tierney further testified that after the curtain was removed and Maag's dead body was revealed, the defendant said, "I don't remember anything. I'm drunk." Upon further questioning, Tierney testified that, "Right after I gave him his rights and told him about his rights, then he made the statement about putting his foot on the gas pedal." He explained why he didn't mention this earlier by stating, "But you had asked me concerning Maag, and I had described that portion [of the conversation] there going to Maag's situation."



about 9:00 P.M. Bielawski came at about 11:30 P.M. His brother let Bielawski in. Bielawski had four quarts of beer with him; Bielawski drank the entire four quarts. The defendant drank no alcoholic beverages during the night. They stayed at the apartment until about 6:00 A.M., then Maag wanted to go home. Bielawski asked the defendant to go out and find his car for him. Defendant found the car and started it. Bielawski came out followed by Maag. Bielawski drove. They went south to 16th Street, made a right turn (west), went to Laramie Avenue and turned left. They went south on Laramie, passed Bielawski's house at 30th and Laramie and went over a long bridge which crossed over a series of railroad tracks. There were two other streets that could have taken them over the railroad tracks but one was four blocks to the west of Laramie and the other four blocks to the east.

Bielawski drove through a stop sign at 35th and Laramie and turned west on 37th Street. Bielawski then started driving "quite fast" and defendant asked him what he was doing. Bielawski responded, "I told you my car could go." Defendant asked Bielawski to slow down but he went through another stop sign. Defendant then said, "Please stop" and Bielawski said, "No." Defendant and Maag put their feet up on the dashboard and the next thing defendant remembered is seeing the car they collided with. He estimated the speed of Bielawski's car at 65 miles per hour; that this speed had been reached by gradual acceleration for four blocks. Defendant stated that Bielawski was "really wasted" (referring to his state of intoxication) when they left the defendant's apartment. Defendant is five feet three inches and weighs 105 pounds. The front seat of Bielawski's car was pulled back as far as possible.

On cross-examination defendant testified that he didn't know if Bielawski went through stop signs on Laramie or 37th Street but



that if such signs were there defendant would not have known it because Bielawski was driving too fast. Defendant was asked if he recalled a conversation between himself and Officer Tierney on June 6 at about 11:30 P.M. at MacNeal Hospital. Over objection of defense counsel defendant answered that he recalled no such conversation; that the two police officers (Tierney and another officer) conversed only with Bielawski; they thought the defendant was sleeping.

Officer Tierney testified for the State on rebuttal:

On June 6 he talked to Bielawski and the defendant in a hospital room concerning the accident; this was a follow-up investigation because he was unable to obtain as much information as he wanted in the emergency room; "[w]e were unable to talk to Mr. Bielawski." Over objection of defense counsel that any statements of defendant were taken in violation of his rights under Miranda, Tierney stated that he talked to both Bielawski and defendant; that defendant told Tierney that he had put his foot on Bielawski's foot, which was on the gas pedal, and the car speeded up. Tierney then told the defendant that he was going to place him under arrest and the defendant said, "So what? I will just say I was reaching for my wallet and my foot slipped off the hump in the center of the car and hit the gas pedal." The trial judge stated that the question of the propriety of admonishing defendant of his Miranda rights was gone into during the hearing on the motion to suppress; that the warnings given to the defendant in the emergency room on June 4 obviated the necessity of rewarning defendant of his Miranda rights on June 6.

Under questioning of the court Tierney stated that he based his opinion that Bielawski and the defendant were not intoxicated by observing them in the emergency room; he stood over their cots



and attempted to detect any odor coming from their mouths by talking directly to each of them. He stated that there were medications in the emergency room. At the coroner's hearing he had testified that it was hard to tell whether the odors he detected were from liquor or medication.

Opinion

Defendant first contends that the court erroneously failed to suppress two admissions of defendant. The first was made to police officer Tierney at the emergency room of MacNeal Hospital shortly after the accident. The second was made at defendant's hospital room on the evening of June 6, two days following the accident. Both statements were to the effect that defendant had stepped on Bielawski's foot thus causing the collision. The first admission was never put into evidence at any point during the trial and therefore defendant cannot urge prejudicial error regarding the manner in which it was elicited.

The second admission was introduced into evidence during the State's case on rebuttal. Defense counsel's objection to its admission was that no Miranda warnings were given immediately prior to the June 6 questioning; that any warnings given to defendant on June 4 had no efficacy due to defendant's physical condition at that time; or that even if the June 4 warnings were effective, they did not "carry over" to June 6.

We deem it unnecessary to discuss any of the above issues because the admission was introduced by the State on rebuttal and for the purpose of impeaching defendant's testimony. Under the holding of Harris v. New York, 401 U.S. 222, this statement was admissible for impeachment purposes despite any possible violation of Miranda or its progeny, so long as it was voluntarily made. As the court stated at page 224:



It does not follow from Miranda that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards [that the statement is voluntary].

The defendant does not attack the "voluntariness" of the June 6 statement in this court and we conclude that it was properly admitted into evidence for impeachment purposes.

Defendant's second contention is that the "perjured testimony" of two State witnesses, Tierney and Bielawski, deprived him of a fair trial.

As to Tierney, defendant points to inconsistencies in his testimony and argues that they amount to "the knowing use of perjury by the State," citing Napue v. Illinois, 360 U.S. 264. At the pretrial hearing, Tierney testified that while in the emergency room, after seeing Maag's dead body, the defendant told him that he (the defendant) was drunk and no longer wanted to talk. However, the record shows that when he answered that the defendant refused to give further details he was referring only to conversations subsequent to defendant's viewing of Maag's body. Tierney also testified that after giving defendant the Miranda warnings and prior to defendant's viewing of Maag's body, defendant admitted (in the emergency room) that he had stepped on Bielawski's foot.

At the trial Tierney reiterated what defendant said after seeing Maag's dead body but when asked if any other conversation took place at that time, he responded, "None whatsoever." Evidently Tierney was again referring to the fact that no conversations were held after defendant viewed Maag's body.

On rebuttal, at trial, Tierney testified that he returned to the hospital on June 6 because he "was unable to get as much information as he wanted at the emergency room." Defendant urges that this statement further indicates that Tierney never obtained an inculpatory statement from the defendant in the emergency room. However, Tierney elaborated on this statement, explaining that "we were unable to question both parties involved [in the emergency



room]. We were unable to talk to Mr. Bielawski. He was quite confused." [Our emphasis.]

In all, the trial judge heard Tierney's testimony at the pre-trial hearing and at the trial. Any inconsistencies in his testimony went to the issue of his credibility and thus the weight to be given to his testimony, but they cannot be viewed as constituting perjury. See People v. Doherty, 36 Ill.2d 286, 222 N.E.2d 501. Defense counsel had the opportunity to highlight any alleged inconsistency in Tierney's testimony at the trial but chose not to cross-examine him. We also note that the defendant's inculpatory statement in the emergency room was never introduced in evidence at trial and therefore it could not have prejudiced him in any manner.

As to the testimony of Bielawski who was indicted along with the defendant, it is pointed out that at trial Bielawski consistently testified that he was promised nothing by the State in return for his testimony and fully expected to be tried on the charges against him at a later date, and that subsequent to defendant's conviction the State dropped its charge against Bielawski. Defendant would have us infer that because the charges were dropped against Bielawski, his testimony amounted to perjury. This contention was raised and rejected under similar circumstances in People v. Beoh, 78 Ill. App.2d 98, 103, 223 N.E.2d 424. See People v. Mullins, 28 Ill.2d 412, 192 N.E.2d 840. We might note that it seems perfectly logical for the State to have dropped the charges against Bielawski once defendant was convicted. As can be seen from our summary of the testimony, either the defendant or Bielawski was the party whose actions were responsible for the accident. Once it was adjudicated that the defendant was guilty as charged, this for all practical purposes meant that the court believed Bielawski was not the guilty party.



Defendant argues that the court should have held a hearing as to the issue of possible perjury by Bielawski when raised by defendant in his post-trial motion. The basis of this argument is the inference of perjury defendant would have us make (as noted above) coupled with the allegation that the "State controlled all of the facts" surrounding any alleged promise of leniency to Bielawski. The "controlled facts" are the conversation between an Assistant State's Attorney and Bielawski prior to defendant's trial, the substance of which Bielawski testified to at the trial, and a conversation between Bielawski and his attorney prior to trial. Bielawski testified that his attorney told him he (Bielawski) would have to stand trial on his charge.

Although there is precedent for holding a post-trial hearing as requested by defendant (People v. Werhollick, 45 Ill.2d 459, 259 N.E.2d 265), we believe that the decision to do so is within the sound discretion of the court, and the movant must certainly show that he could not with due diligence have elicited such evidence at trial. See People v. Vandever, 79 Ill. App.2d 97, 100, 223 N.E.2d 273. See also People v. Lewis, 22 Ill.2d 68, 72, 174 N.E.2d 197. Defendant appears to have made no effort to call the Assistant State's Attorney or Bielawski's attorney to testify at the trial. (The record shows that Bielawski's lawyer sat in court when Bielawski testified.) We conclude that the court did not abuse its discretion in denying defendant's motion for a post-trial hearing as to alleged perjury of Bielawski.

Defendant's third contention is that the court erred in allowing Officer Tierney to testify it was his opinion that Bielawski was not drunk when he saw him in the emergency room after the accident.

When Tierney was first questioned as to this issue during the State's case in chief, defense counsel objected to the question

on the grounds that it was "immaterial, totally irrelevant." On appeal he labels the issue of Bielawski's sobriety or non-sobriety "the critical issue" in the case, obviously admitting that the question was highly relevant. When Tierney was recalled on rebuttal, he was again asked by the Assistant State's Attorney to state his opinion, based on his experience as a police officer, as to Bielawski's state of sobriety after the accident. Defense counsel made no objection. The court then questioned Tierney on the issue and defense counsel again failed to make any objection.

Now, on appeal, defense counsel argues that the opinion testimony should have been excluded because the State failed to lay a proper foundation for its introduction, i.e., that Tierney did not have an adequate opportunity to observe Bielawski so as to form an opinion.

It is well established that an objection to the admission of testimony is limited to the ground specified and does not cover other grounds not specified. Hyatt v. Cox, 57 Ill. App.2d 293, 206 N.E.2d 260; People ex rel. Blackmon v. Brent, 97 Ill. App.2d 438, 240 N.E.2d 255. See De Marco v. McGill, 402 Ill. 46, 83 N.E. 2d 313. Defendant's contention must therefore be dismissed.

We would add that the evidence shows that Tierney did have an adequate opportunity to observe Bielawski's condition in the emergency room. Tierney stated under questioning by the court that he stood over the cot Bielawski was lying in and attempted to smell any odor coming from his mouth; that he talked directly to him. Despite the fact that the emergency room apparently contained odors from medications, we believe Tierney had an adequate opportunity to observe Bielawski's condition and thus give an opinion as to his state of sobriety.

Defendant's final contention is that he was not proven guilty beyond a reasonable doubt. He argues that as a matter of law the

uncorroborated and impeached testimony of an accomplice (Bielawski) is insufficient to prove a defendant guilty beyond a reasonable doubt. Defendant points to the following aspects of Bielawski's testimony to show that it was not worthy of belief: that Bielawski could not remember the route taken to get to 37th Street; that Bielawski denied passing his own home on the way to 37th Street despite the fact that it was located on Laramie Avenue, a route that the defendant testified they traveled on in order to get to 37th Street; and the fact that Bielawski drank about two quarts of beer over a 12 hour period. Defendant also stresses the facts that Bielawski was six feet, 170 pounds and defendant was five feet, three inches, 105 pounds, inferring that Bielawski could not possibly have been subject to the physical actions of the smaller defendant, and that pictures of Bielawski's wrecked car indicate that the speed of the car had to be great at the point of collision and such speed could not have been built up within the span of about one block as Bielawski testified.

On the other hand, Bielawski clearly testified that the defendant placed his foot over Bielawski's foot causing him to go through a stop sign and crash into another car. Officer Tierney testified that the defendant admitted placing his foot on Bielawski's and told Tierney how he would testify in court to avoid a possible conviction.

It is well established law in this state that the uncorroborated testimony of an accomplice, if it satisfies the court beyond a reasonable doubt, is sufficient to sustain a conviction. People v. Nitti, 8 Ill.2d 136, 138, 139, 133 N.E.2d 12. Furthermore, the direct contradiction of the defendant's testimony (by Tierney here) is entitled to great weight. See People v. Mentola, 47 Ill.2d 579, 268 N.E.2d 8; People v. Brown, 51 Ill.2d 271, 273, 281 N.E.2d 682. The cases cited by defendant, People v. Hermens,

5 Ill.2d 277, 125 N.E.2d 500; People v. Bendas, 366 Ill. 385, 9 N.E.2d 237; and People v. Hudson, 341 Ill. 127, 173 N.E. 278) are factually inapposite.

All of the discrepancies in the State's case were presented to the trier of fact. He believed that Bielawski's testimony coupled with the corroborating testimony of Officer Tierney showed that defendant was guilty beyond a reasonable doubt.

The decision of the circuit court is affirmed.

AFFIRMED.

Lorenz, P.J., and English, J., concur.

Abstract only.



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CRITERION ADVERTISING COMPANY, INC.,))	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,))	COURT OF COOK COUNTY.
vs.))	
SPORTSMAN'S PARK and W. H. JOHNSTON,))	
JR., )	)	Hon. Mark E. Jones,
Defendants-Appellants. )	)	Presiding.

Mr. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

Criterion Advertising Company, Inc. (plaintiff) brought suit on written contracts against Sportsman's Park and W. H. Johnston, Jr. (defendants) to recover amounts allegedly due for the posting of two types of advertising. After trial by the court, a judgment was entered in favor of plaintiff from which defendants appeal.

It is agreed that the parties entered into two written contracts for placing by plaintiff of poster panels advertising horse racing activities sponsored by defendants. One contract provided for placing and maintaining of 400 poster panels for two weeks at the rate of \$5 per panel each. This contract referred to "three-sheet" panels and called for a total payment to plaintiff of \$2000. The other contract provided for posting of 140 so-called "King Size" poster panels from May 15, 1967 to August 15, 1967, at a rate of \$20 per panel per month; being a total payment of \$8400.

It is undisputed that representatives of the parties agreed orally to changes in these contracts. This was done before defendants executed the agreements. These modifications were evidenced by a letter dated April 6, 1967, sent by plaintiff

to defendant Johnston. This letter provided that plaintiff would post an extra 100 of the "three-sheet" panels without additional charge. It also provided that plaintiff would paste over each of the 500 initial posters, which were to advertise defendants' program of flat or thoroughbred racing, new material advertising defendants' subsequent harness racing activities, without extra charge. The letter also provided that each of these types of posters would remain "up at least a month or more."

The letter also stated that the second contract for the King Size posters was enclosed providing for posting of 140 panels at \$20 per month from May 15 for three months through August 15. This language followed:

"We also [sic] aware that your track closes September 2nd and will act accordingly on the King Size as well."

In their answer to plaintiff's complaint, defendants alleged that plaintiff did not post the 500 panels of the "three-sheet" posters but only a lesser number for a shorter period of time so that defendants were entitled to a credit of \$3703. Plaintiff made a motion for summary judgment in its favor and defendants filed counteraffidavits setting up this same defense. The trial court entered summary judgment in favor of plaintiff for \$6697, reserving for trial the question of the credit of \$3703 thus claimed by defendants.

At the trial, William H. Smith, the only witness called by plaintiff, testified that he had spoken with defendant Johnston prior to signature of the two contracts and that he had sent the letter to Johnston after these conversations. Smith also testified that he did not make any agreement with

Johnston other than what was contained in the two contracts and the letter. Johnston testified as a witness for defendants. He stated that, in conversation with Smith he was told that defendants would receive an additional 100 of the "three-sheet" panels without extra charge. This would make a total of 500 of these posters which would advertise the initial thoroughbred or flat racing meet. He also testified that the parties then orally agreed that the "three-sheet" panels, and also the King Size panels, would remain posted during the entire final three-and-one-half-months of the racing meet, in connection with harness racing. The letter was written and sent to him as evidence of this verbal agreement because of the fact that these provisions differed from the stipulations in the two contracts.

Johnston conceded that the King Size posters were all furnished and remained up for the agreed period of time. Thus, no question is raised regarding the agreement for these panels. He also testified that the "three-sheet" panels were posted for the initial thoroughbred or flat racing. In addition, 400 of these smaller posters were installed for the harness meet but remained up only for approximately one month, from May 21 to July 3, 1967, and not until the end of the harness meet on September 2, 1967. One hundred of these posters remained up from July 3 to September 2, 1967.

Plaintiff's witness, William H. Smith, was not called in rebuttal after the testimony of Johnston. It appears from his testimony as part of the plaintiff's case, that all of the King Size posters were provided; all of the initial small posters to advertise the flat racing and the next group of small posters to advertise the harness racing were all installed and were permitted to remain up for more than a month.

The legal principles applicable to this type of situation are quite apparent. Examination of the two formal contracts shows that they appear to be independent and neither refers to the other. However, the accompanying letter refers specifically to both of the formal contracts and appears upon its face to be an amendment or supplement to both of them. Under these circumstances, if there is any doubt in the interpretation of the two formal contracts, it becomes necessary to consider the provisions of the accompanying letter. See West Lands Const. Co. Ltd. v. Calhan, 124 Ill.App.2d 453, 457-458, 259 N.E.2d 408.

Reading of the two contracts and of the letter shows that these documents are capable of being understood in more senses than one. Their meaning is further shown to be unclear by the divergent positions of the parties here. Plaintiff urges that the "three-sheet" panels advertising the harness racing, or latter portion of the racing meet, were to remain posted for at least a month or more. Defendants contend that 500 of these posters were to remain in place from approximately May 26 to the end of the racing meet on September 2, 1967. Under these circumstances, the agreements between these parties must necessarily be classified as ambiguous. First Nat. Bank v. Victor Comptometer Corp., 123 Ill.App.2d 335, 341, 260 N.E.2d 99.

In construing an ambiguous agreement, the paramount objective is to ascertain the intention of the parties. (Donahue v. Rockford Showcase & Fixture Co., 87 Ill.App.2d 47, 51, 230 N.E.2d 278.) In addition, where an ambiguity exists which cannot be resolved from the language of the instruments in question, then that "***language may be explained by extrinsic evidence so that the true intention of the parties may be learned." (LaSalle Nat. Ins. v. Executive Auto Leasing, 121 Ill.App.2d 430, 437, 257 N.E.2d 508 citing Martindell v. Lake Shore Nat. Bank, 15 Ill.2d 272, 154 N.E.2d 683.) In such cases, where it is necessary to ascertain

the intent of the parties by extrinsic evidence which is controverted, ascertainment of intention becomes an issue for the trier of fact. Franks v. North Shore Farms Inc., 115 Ill. App.2d 57, 68-69, 253 N.E.2d 45.

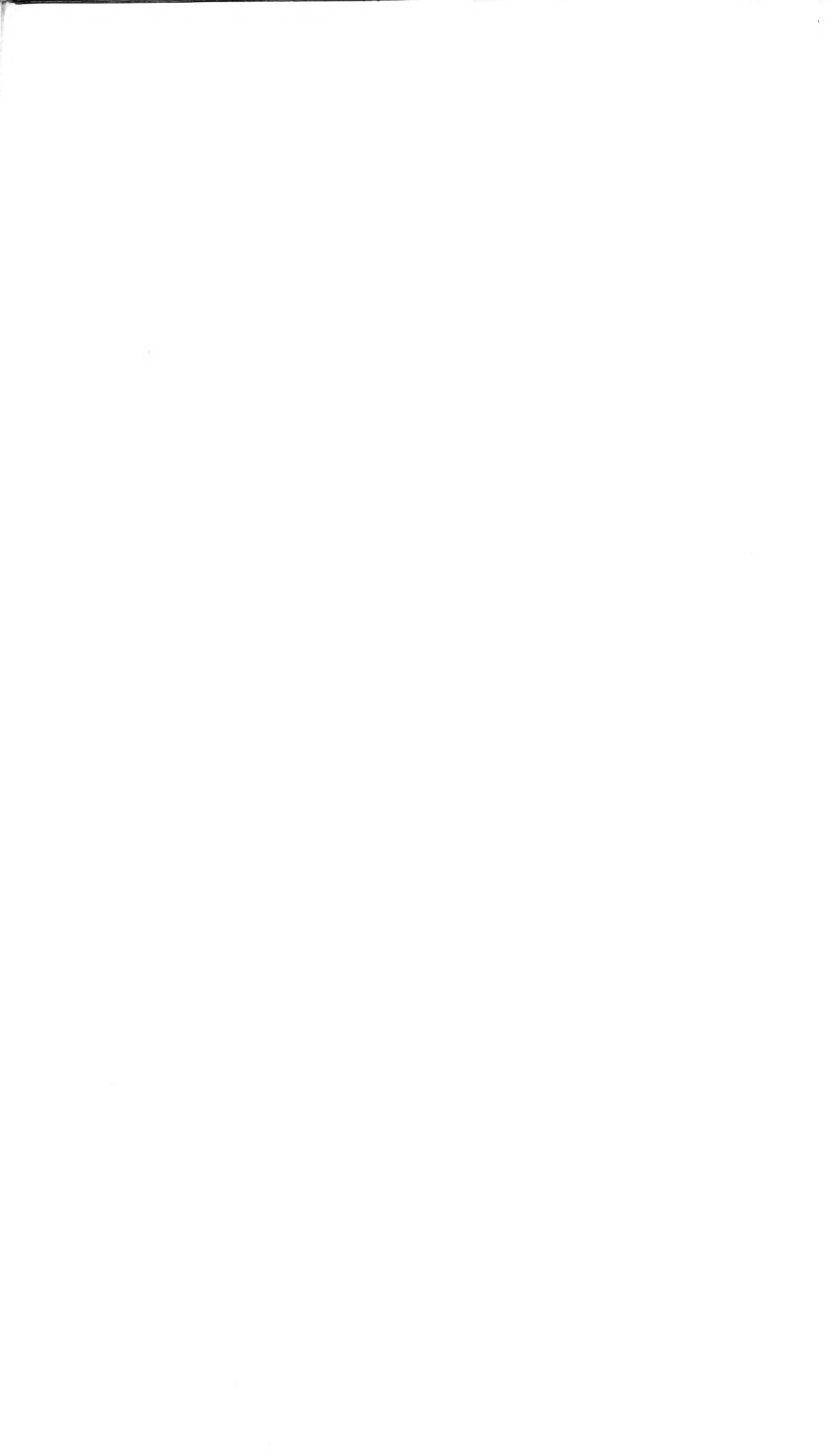
Thus, in the case at bar, it was the duty of the court to arrive at the intent of the parties to these ambiguous documents by resolution of questions of fact presented by extrinsic evidence. In such a situation, it was necessary for the trial court to determine credibility of witnesses and to resolve conflicts in evidence. His findings can be set aside only if the evidence overwhelmingly favors the losing party. Schulenburg v. Signatrol Inc., 37 Ill.2d 352, 356, 226 N.E.2d 624; Hill Behan Lumber Co. v. Marchese, 1 Ill.App.3d 789, 791, 275 N.E.2d 451.

Here, defendants' evidence reveals a statement of the intention of the parties according to the conversation of their representatives given to the court by an apparently credible witness. On the contrary, the testimony in behalf of plaintiff shows that such conversations were held between the parties but plaintiff's witness, instead of stating his version of the conversations, or denying that advanced by defendants, merely stated that he made no agreement with defendant Johnston other than what was contained in the disputed document. Under these circumstances, we are impelled to find that the parties actually agreed to a time period of approximately three-and-one-half-months for posting of the "three-sheet" panels as stated by defendant Johnston. This conclusion is bolstered by the principle that, since plaintiff prepared the disputed document and chose the ambiguous words, the letter should be construed against plaintiff and in favor of defendants. Donahue v. Rockford Showcase & Fixture Co., 87 Ill.App.2d 47, 51, 230 N.E.2d 278.



It remains to determine the effect of this conclusion upon the judgment of the trial court. We must commence from the premise that defendants owed plaintiff the total consideration expressed in the contract for the larger posters or \$2400. Defendants are entitled to a reduction of their indebtedness on the remaining amount of \$2000 for two postings of "three-sheet" panels. This reduction must be computed only by proration of the expressed consideration because there is no proof of other damages. It is agreed that the first posting of smaller panels advertising the flat or thoroughbred racing was sufficient in number and remained in place for the agreed time of one month, representing one fourth of the total consideration. As regards posting of the harness panels, from May 21 to July 3, 409 panels were posted. This was a shortage of 100 panels for approximately one month. From July 3 to September 2 only 100 panels were posted, resulting in a shortage of 400 panels for approximately two months.

The sum of \$1500, or three fourths of the total price in the "three-sheet" contract, was to be paid for the later harness race posting of approximately three months. Therefore, as regards the three month period, the cost should be allocated at the rate of \$500 per month. For roughly one month, from May 21 to July 3, defendants received only four fifths of the panels so that they are entitled to a credit of one fifth for the first month, or \$100. For July and August, and to the end of the meet, only 100 panels were posted. Defendants are, therefore, entitled to a credit of approximately four fifths of the monthly allocated cost for July and August, being a total of \$800. Adding this to the June credit of \$100 above specified, we find that defendants are entitled to a total credit of \$900. In other words, plaintiff is entitled to recover from defendants the total cost



of \$10,400 less \$900, or \$9500. Since plaintiff has already obtained a judgment for \$6697, there is due and owing to plaintiff the remaining sum of \$2803.

The judgment entered by the trial court in favor of plaintiff and against defendants, in the amount of \$4573.22, is reduced to \$2803, and, as thus modified, it is affirmed. We find in this record no "***unreasonable and vexatious delay of payment***" which would authorize allowance of interest to plaintiff. (Ill.Rev.Stat. 1971, ch.74, par.2.) See also, Kespohl v. Northern Trust Co., 131 Ill.App.2d 188, 191, 266 N.E. 2d 371.

Judgment affirmed as modified.

BURKE and EGAN, JJ. concur.



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PEOPLE OF THE STATE OF ILLINOIS.)	
)	APPEAL FROM THE CIRCUIT
Appellee,)	COURT OF COOK COUNTY.
)	
v.)	
)	
SALVADOR FLORES,	)	Hon. George Dolezal,
	)	Presiding.
Appellant.)	

Mr. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

After a bench trial, Salvador Flores (defendant) was found guilty of aggravated battery (Ill.Rev.Stat. 1971, ch.38, par.12-4(a)(b-1).) He was placed on probation for five years with the first year to be served in the Illinois State Farm at Vandalia.

No error of law appears in this record. Defendant was identified by the victim some eight days after the incident while the latter was in the hospital. This type of identification has consistently been approved by our courts. (People v. Owens, 126 Ill.App.2d 379, 385, 261 N.E.2d 785.) Further, this record establishes that identification of defendant was proper because it was based upon an adequate "***source independent of and untainted by the identification at the pretrial confrontation***." (People v. Fox, 48 Ill.2d 239, 245, 269 N.E.2d 720.) (See also, People v. Bixler, 49 Ill.2d 328, 275 N.E.2d 392.) Similarly, defendant's argument that he was not afforded counsel at the time he was identified raises no issue of law. The requirement of counsel is not applicable to pre-indictment confrontations. People v. Cesarz, 44 Ill.2d 180, 184, 255 N.E.2d 1; also Kirby v. Illinois, 92 S.Ct. 1877, 32 L.Ed.2d 411.



The sole remaining issue raised by the defendant on appeal is that the People failed to prove him guilty beyond a reasonable doubt. An examination of the record reveals sufficient evidence to support the defendant's conviction even though the defendant presented evidence to the contrary. An opinion by this court would have no precedential value. There is no reasonable doubt as to defendant's guilt. The judgment is accordingly affirmed.

This opinion is filed and the case disposed of pursuant to Illinois Supreme Court Rule 23, adopted effective January 31, 1972.

Judgment affirmed.

BURKE and EGAN, JJ. concur.

ARST.



MAY 1 1973

NO. 57200

1 97.1³ 233

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Appellee,	)	COOK COUNTY
)	
vs.)	
)	
WALTER DANNER,	)	HONORABLE
	)	JAMES J. MEJDA,
Appellant.	)	PRESIDING.

MR. JUSTICE LEIGHTON delivered the opinion of the court:

This is an appeal from an order that dismissed, without an evidentiary hearing, appellant's post-conviction petition. The public defender of Cook County is the appointed appellate counsel. On September 19, 1972, he filed a motion to withdraw and be relieved of the responsibility of representing appellant in this appeal. In compliance with Anders v. California (1967), 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396, the public defender supports his motion with a brief which concludes that this appeal cannot possibly be successful. As is our practice, we notified appellant of the motion and furnished him with a copy of the brief. He has responded, asking us to allow the public defender's motion and appoint another appellate counsel for him. In order to decide the questions presented by the motion to withdraw and the request for appointment of other counsel, we have examined the record.

This discloses that in 1967, in two separate indictments, appellant was charged with a murder, two armed robberies and one attempt to commit robbery. On November 21, 1967, after a trial by jury, he was convicted of the murder and the attempt to commit robbery. The court sentenced him to serve 50 to 100 years for murder and 7 - 14 years for attempt robbery. On December 14, 1967, appellant appeared before the same trial judge and entered pleas of guilty to the two armed robberies. For these two crimes, he was sentenced to serve

one to five years. All the sentences were to be served concurrently. In his jury trial, and when he pled guilty to the two armed robberies, appellant was represented by counsel of his choice. Thereafter, again represented by counsel of his choice, he appealed the murder and attempt robbery convictions. On January 16, 1969, this court affirmed the two convictions. People v. Danner, 105 Ill. App. 2d 126, 245 N.E. 2d 106.

On October 15, 1970, proceeding under the Illinois Post-Conviction Act, Ill. Rev. Stat. 1969, ch. 38, par. 122-1, et seq., appellant filed his post-conviction petition. The State moved to dismiss on the ground that the petition did not state a cause for which relief could be granted because the doctrine of res judicata barred its allegations when this court affirmed his conviction. After hearing argument, with appellant represented by the public defender, the court sustained the motion and dismissed the petition. In our judgment, this ruling was correct. For this reason, we concur in the public defender's view that this appeal is without merit. Two reasons support our conclusion.

First, appellant's petition does not allege any facts which state a case for relief under the post-conviction act. Second, it has been held consistently that where a person convicted of a crime takes an appeal from a criminal conviction on a complete record, the judgment of the reviewing court is res judicata as to all issues actually decided and all issues which could have been presented. People v. Kamsler, 39 Ill. 2d 73, 74, 233 N.E. 2d 415; People v. Beckham, 46 Ill. 2d 569, 264 N.E. 2d 149; People v. Adams, 52 Ill. 2d 218, 287 N.E. 2d 695; People v. Bracey, ____ Ill. App. 3d ____, ____ N.E. 2d ____ (No. 56848).

In this case, appellant appealed his convictions after

the trial by jury. He was represented by counsel of his choice and free to raise any question that went to the constitutionality of his conviction. He did not. Therefore, the questions he now seeks to raise in his post-conviction petition were waived. See People v. Armes, 37 Ill. 2d 457, ____ N.E. 2d ____; People v. Cox, 34 Ill. 2d 66, ____ N.E. 2d _____. Although our law of post-conviction remedies recognizes that there are occasions when the doctrine of res judicata may be relaxed, appellant's case is not one of them. See People v. Jennings, 411 Ill. 21, 102 N.E. 2d 324; People v. Henderson, 39 Ill. 2d 342, 235 N.E. 2d 580.

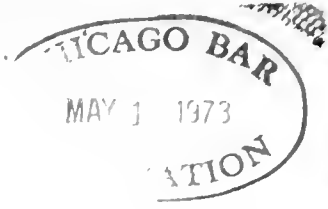
Therefore, after discharging the duty imposed on us by Anders, we conclude that this appeal is wholly frivolous. The public defender of Cook County is given leave to withdraw; appellant's request for appointment of other counsel to pursue this appeal is denied and the judgment is affirmed.

Affirmed.

Schwartz, J. and Hayes, J., Concur.

Publish abstract only.

4/7/72



ABST.

55189

9 11 3 241

WILLIAM MORRISSEY,)	
)	
Plaintiff-Appellant,)	
)	
	)	Appeal from the Circuit
)	
v.	)	Court of Cook County.
)	
)	
)	
TOM WARD,)	
)	
	)	John Ouska, Judge Presiding.
Defendant-Appellee.)	

PER CURIAM.

William Morrissey, hereinafter called plaintiff, filed suit against Tom Ward, hereinafter called defendant, in the Circuit Court of Cook County to recover for property damage to plaintiff's car caused by defendant's negligent operation of his automobile. The trial court in a bench trial found on the issue of liability for plaintiff. However, the trial court found that the plaintiff had not proven damages and entered judgment for defendant.

Plaintiff presented a repair bill in the amount of \$335.36 from Jack Thompson Oldsmobile. The bill was stamped "Paid", but the paid stamp had been crossed out and the word "Charge" had been stamped on the bill. However, the plaintiff testified that the bill had in fact been paid. The plaintiff was never asked who had paid the bill. The defense presented no evidence as to damages. At the close of the evidence and after arguments the trial judge refused to allow the bill into evidence. The trial judge held that the bill

and the testimony of the plaintiff taken together were insufficient to establish damages and entered judgment for defendant. Plaintiff asked leave of court to reopen its case and present a witness for Jack Thompson Oldsmobile who would testify that the bill had been paid. The trial court refused to reopen the case.

The plaintiff on appeal argues that the repair bill and the uncontraverted testimony of the plaintiff that the bill had been paid was sufficient to establish damages and that the trial court erred in refusing to allow him to reopen the case and present further evidence of damages. The defense argues that the plaintiff's testimony was inadmissible hearsay because the plaintiff did not testify that he paid the bill, but only that the bill had been paid and that the trial judge properly refused to reopen the case.

It has long been the established rule in Illinois that a paid automobile repair bill is admissible as prima facie evidence of the necessity and reasonableness of the repairs. Byalos v. Matheson, 328 Ill. 269, 159 N.E. 242. The bill itself must be regular and there must be nothing to cast suspicion on the transaction. Cloyes v. Plaatje, 231 Ill.App. 183. The evidence of payment may come from the bill itself, Schmidt v. Sinclair, 342 Ill. App. 484, 97 N.E.2d 129, from the testimony of others, Smith v. Champaign-Urbana City Lines, Inc., 116 Ill.App.2d 289, 252 N.E.2d 381, or from the testimony of the plaintiff. Saunders v. Wilson, 114 Ill.App.2d 380, 253 N.E.2d 89.

In the case at bar we have no transcript of the trial (no court reporter was present), but only a transcript of the arguments conducted after the trial. In the argument all parties agreed and the trial judge three times stated that the plaintiff had testified that the bill from Jack Thompson Olds was paid. Defense counsel stated that he deliberately did not ask the plaintiff who paid the bill because he was afraid the plaintiff would have testified that he had in fact paid the bill. Uncontraverted testimony under oath that a repair bill has been paid is sufficient to establish payment and render the bill admissible as proof of damages. Saunders v. Wilson, 114 Ill.App.2d 380, 253 N.E.2d 89. The testimony of the plaintiff that the bill had been paid was admitted into evidence. Whether this knowledge was gained by personal experience or by hearsay does not appear of record. The defense attorney deliberately did not seek to so determine even after the testimony was admitted. From comments made during argument it did not appear that the defense attorney objected to plaintiff's testimony at trial. The testimony of the plaintiff — even if it were objectionable — once admitted into evidence must be given its natural probative effect. Ascher Bros. v. Industrial Comm., 311 Ill. 258, 142 N.E. 488. Stifel Nicolaus & Co. v. Coloia, 2 Ill.App.3d 224, 276 N.E.2d 408. The uncontradicted testimony of the plaintiff that the repair bill was paid, there being nothing to cast suspicion on the fairness and good faith of the bill, was sufficient proof of damages.

Having reached this conclusion it is not necessary to consider plaintiff's argument that he should have been permitted to reopen his case and present further evidence.

For the foregoing reasons, the judgment of the trial court is reversed and the case remanded with directions to enter judgment in favor of the plaintiff for the sum of \$335.36.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

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MAY 1 1973

No. 56027

J. DERLAND JOHNSTON,)	APPEAL FROM THE
)	CIRCUIT COURT OF
Plaintiff-Appellant,)	COOK COUNTY.
)	
vs.)	
)	
EILEEN JOHNSTON,	)	HONORABLE
	)	NORMAN H. EIGER,
Defendant-Appellee.	)	PRESIDING.

MR. PRESIDING JUSTICE MCGLOON delivered the opinion of the court:

This is a post-divorce decree proceeding. The action was initiated by defendant's petition for a rule to show cause alleging that the plaintiff was in arrears in his monthly payments of alimony due her in the amount of \$5250 plus interest and costs. The plaintiff answered the petition and counter-petitioned for a modification of the divorce decree and termination of alimony payments on the grounds that there had been a material change in circumstances since the decree was entered. After a hearing the trial judge dismissed plaintiff's counter-petition, reaffirmed the original alimony award of \$350 per month and ordered the plaintiff to make full payment of the amount he was in arrears. Plaintiff pursues this appeal asking a reversal of the trial judge's order and argues that due to a material change in his financial position he is no longer able to continue the alimony payments.

We affirm.

The parties were divorced after 29 years of marriage on June 22, 1965, by a decree entered by the Chancery Court of Garland County, Arkansas. The decree awarded custody of the parties' minor child to defendant and provided for alimony payments to defendant by plaintiff in the sum of \$350 per month. The property settlement agreement provided that the defendant was to receive a substantial portion of the jointly held assets.

On February 2, 1968, the defendant petitioned the circuit court of Cook County for registration of the Arkansas decree as provided for in the Uniform Enforcement of Foreign Judgments Act. (Ill.Rev.Stat. 1969, ch.77, par.88 et. seq.) After the plaintiff appeared and answered the petition, the circuit court on April 22,



1968, entered judgment to enroll the Arkansas decree thereby making the registered judgment a final judgment of the circuit court of Cook County and giving this court the jurisdiction to review the instant case. Light v. Light (1958), 12 Ill.2d 502, 147 N.E.2d 34.

The issue presented in this appeal arose in June, 1970, when the defendant filed a petition for a rule to show cause alleging that the plaintiff was in arrears in the payment of alimony to defendant. The plaintiff answered and counter-petitioned for an abatement of the alimony awarded by the decree. The counter-petition alleged that plaintiff had suffered a material change in circumstances in that his obligations had increased materially while his income had remained substantially the same as it was in 1965 at the time the decree was entered.

During two hearings in the trial court it was disclosed that the only change in plaintiff's circumstances that could have caused a substantial increase in his obligations since 1965 was that he had remarried. There was no dispute that the plaintiff was earning the same salary, approximately \$1200 per month, as he had in 1965. Although his monthly expenses have increased markedly since then, the only specific cause of the increase that was disclosed was due to the support of his second spouse.

After a hearing the trial judge found that there had been no substantial change in plaintiff's circumstances and dismissed his counter-petition. After further proceedings the trial judge on May 3, 1971, found plaintiff to be in arrears in the payment of alimony in the sum of \$6907.80 and ordered him to transfer to defendant certain shares of stock, thereby reducing his arrearage to \$4900 and to reduce this remaining amount at the rate of \$100 a month, payable in addition to the regular monthly alimony payment of \$350.

In this appeal the plaintiff argues that the order of the trial court dismissing his counter-petition and affirming the original alimony award should be reversed because there has been a material change in his finances making the continued payment of



alimony to the defendant an impossible burden for him to bear.

The cases cited by the plaintiff in support of his argument are not apposite. These cases all affirm the power of the courts to modify an alimony award after the original decree is entered, but all deal with factual situations which are substantially different from the facts presented in the instant case. In Maginnis v. Maginnis (1926), 323 Ill. 113, 153 N.E. 654, the court affirmed the decision of the trial court to abate the defendant's obligation to pay alimony because of the subsequent marriage of the wife who had obtained the divorce. In Igney v. Igney (1940), 303 Ill.App. 563, 25 N.E.2d 608, and Scalfaro v. Scalfaro (1970), 123 Ill.App.2d 23, 259 N.E.2d 644, the original award of alimony was modified because the divorced husband's earning power had decreased to a marked degree.

In the instant case the defendant has not remarried nor have the plaintiff's monthly earnings decreased since the time the decree was entered. During the hearing held in the trial court, the only specific change in circumstances that the plaintiff could point to in order to explain his allegation of increased obligation was his subsequent remarriage. It is a well-established principle that a change in circumstances sufficient to warrant a change in alimony provisions must be fortuitous and not one brought on by the party seeking reduction. (Loucks v. Loucks (1971), 130 Ill.App.2d 961, 266 N.E.2d 924.) The obligation of a spouse to pay permanent alimony is not removed by his subsequent marriage even though the effect of the continued obligation may be to deprive the second wife of her current means of support. Meyes v. Mayes (1960), 23 Ill.App.2d 513, 163 N.E.2d 235; Stewart v. Stewart (1954), 1 Ill.App.2d 283, 117 N.E.2d 579.

Both the trial judge and counsel for the defendant agreed that the plaintiff may be in a difficult financial situation; but in view of the fact that this situation is of his own making, it does not constitute a sufficient change in circumstances to allow an abatement or modification of the original decree.



For this reason the judgment of the circuit court is affirmed.

Judgment affirmed.

Dempsey and McNamara, JJ., concur.



MAY 1 1973

No. 57116

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
vs.)	
)	
RONALD MYRON,	)	HONORABLE
	)	WAYNE W. OLSON,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM:

The defendant, Ronald Myron, was convicted in the circuit court of Cook County, after a bench trial, of possession of hallucinogenic drugs in violation of Section 802(c) of the Drug Abuse Control Act. (Ill.Rev.Stat. 1969, ch. 111 1/2, par. 802(c).) The defendant was sentenced to a term of one year at the Illinois State Farm.

On the motion to suppress evidence, Detective O'Donald testified that in August, 1970, he met Miss Laura May. They discussed getting high at parties and purchasing pills in large quantities. Several weeks later he phoned Miss May and agreed to meet her at Lum's Restaurant. Detective O'Donald informed Miss May that he wanted to purchase pills in large quantity. Together they went to 535 North Michigan where they met the defendant. All three went to a restaurant where they discussed pills and getting high at parties. The defendant informed Detective O'Donald that he could obtain pills at one dollar per tablet. The defendant took 500 pills out of his pocket and handed them to Detective O'Donald. Detective O'Donald then placed the defendant and Miss May under arrest. With the defendant's permission, Detective O'Donald searched the defendant's apartment.

Ronald Myron testified that he was arrested by Officer O'Donald and did not give consent to search his apartment.

The motion to suppress was granted as to material found in the defendant's apartment, but was denied as to the pills. Both parties stipulated that all of the evidence heard on the motion would be the same evidence adduced at trial. Further, there was a stipulation that the laboratory report showed the pills in question to be an hallucinogenic drug. After arguments by both parties,



the trial judge found the defendant guilty. The defense attorney then stated that the defendant had further testimony to offer. The trial judge stated that he was under the belief that both parties had rested. Over the State's objection, the trial judge allowed the defendant to testify again. The defendant was then found guilty.

On appeal the defendant argues only that he was denied due process and equal protection of law when he was found guilty before he had rested his case. The case of People v. Harris, ___ Ill.App.3d ___, 270 N.E.2d 232, recently decided by this court, is dispositive of this issue.

The judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Per curiam.

MAY 1 1973

No. 57138

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
vs.)	
)	
BERT L. DALY, JR.,	)	HONORABLE
	)	NORMAN A. KORFIST,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM:

A complaint charging defendant with aggravated battery was amended immediately prior to trial and the charge reduced to simple battery. (Ill.Rev.Stat. 1971, ch. 38, pars.12-3, 12-4.) Defendant was found guilty at a bench trial of battery and was fined the sum of \$50 and costs. Defendant's sole contention on appeal relates to the sufficiency of the complaint.

The complaint, as amended, reads:

Officer Gary L. Doss, complainant, *** states that Bert L. Daly has, on or about July 4th 1971 at Madden Zone Center 1 St. and Roosevelt Rd. committed the offense of Battery in that he intentionally and knowingly without legal justification, committed a battery on said officer Gary Doss, knowing him to be a peace officer in uniform and in the performance of his duties, in that he kneed said officer in the groin, while he was awaiting treatment at the Madden Zone Center located at 1 St. Avenue and Roosevelt Rd. in violation of Chapter 38, Section 12-3 **** [sic].

Defendant contends that the complaint fails to charge that the physical contact therein alleged was of an insulting or provoking nature or caused bodily harm, as required by Section 12-3 of the Criminal Code, and that therefore the complaint is defective. We disagree.

In the recent case of People v. Bowman (1971), 270 N.E. 2d 285, this court was faced with a complaint containing language identical to the instant case except that the complaint there alleged that the victim was "struck about the head and body" whereas here the complaint alleged he was "kneed in the groin." The court in Bowman held that the language described with specificity the "physical contact of an insulting or provoking nature" proscribed

by the statute, as does the language contained in the instant complaint.

As to defendant's argument that we cannot consider the amendment to the original complaint in our determination of this case, it need only be said that the amendment was made in open court and with the knowledge of the defendant, who thereafter waived reswearing of the complainant and who pleaded not guilty to the amended complaint. See People v. DeGroot, 102 Ill.App.2d 1, 247 N.E.2d 177.

The cases cited by defendant are not in point: People v. Abrams, 48 Ill.2d 446, 271 N.E.2d 37; People v. Perlman, 15 Ill.App.2d 239, 145 N.E.2d 762; People v. Stringfield, 37 Ill.App.2d 344, 185 N.E.2d 381.

For these reasons the judgment is affirmed.

Judgment affirmed.

Per Curiam.

12/1/72

56494

PEOPLE OF THE STATE OF ILLINOIS,) APPEAL FROM
) CIRCUIT COURT
 Plaintiff-Appellee,) OF COOK COUNTY.
)
 v.)
)
 HARON E. RUCKER,) HONORABLE
) IRVING KIPNIS,
 Defendant-Appellant.) PRESIDING.

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Haron E. Rucker and Gregory Gaines were charged with criminal damage to property in violation of Section 21-1 of the Criminal Code, Ill. Rev. Stat. 1971, ch. 38, par. 21-1. At a bench trial the defendants were found guilty. Haron E. Rucker was sentenced to six months in County Jail and he now appeals.

On appeal Rucker contends that the State failed to prove him guilty beyond a reasonable doubt because the State's case was entirely circumstantial and did not exclude every reasonable hypothesis of innocence; and that he was prejudiced when upon his case first being called the trial judge was informed that Rucker had three separate cases pending.

The record shows that on August 24, 1971, in the courtroom of the Honorable Irving Kipnis, the case was called by the court clerk. The judge was informed that the defendant, Haron Rucker, had three separate charges pending, two for disorderly conduct and one for burglary. The public defender was appointed to represent both defendants on all charges and the case was passed for him to confer with his clients. When the case was recalled, the State was granted leave to nolle prosequere the burglary charge and to file a charge of Criminal Damage to Property. Defendant pleaded not guilty to this charge and waived a jury trial.

Chicago police officer Carl Dorsey testified that on August 23, 1971, at 3:25 A.M. he stopped five male teens for a curfew check in the vicinity of 6600 South Halsted. After

dispersing the teens, he observed Haron Rucker and Gregory Gaines go east on 66th Street while the other three teens went west on 66th Street. At 3:30 A.M. he received a radio call and proceeded to the National Tea Store located at 6611 South Halsted (east of where the five teens were stopped). Officer Dorsey heard glass breaking and observed Haron E. Rucker and Gregory Gaines in front of the store. Upon seeing the marked police vehicle both Rucker and Gaines ran into the alley. Officer Dorsey observed that the window of the National Tea Store had been broken and a brick was lying inside. He chased both men and apprehended Gaines hiding on the porch at 6623 South Union. Haron Rucker was arrested by other officers a short distance away.

Jessie Johnson, a security guard for National Tea Co. testified that the defendants did not have permission to break the window of the National Tea Co. store. It was stipulated that National Tea Co. is a corporation licensed to do business in the State of Illinois.

Gregory Gaines testified that he did not break the store window; that upon hearing the police he ran only because it was after curfew. He testified that he was not hiding on the porch at 6623 Union but merely sitting there at 3:30 A.M. after running from the police.

Haron Rucker testified that he did not hear the window break and did not run when he heard the police but walked to 706 West Marquette where he stopped to see a friend at 3:30 A.M.

The defendant first argues that he was not proven guilty beyond a reasonable doubt because the State's case was entirely circumstantial and did not exclude every reasonable hypothesis of innocence. "[I]t is well settled that the commission of an offense may be established entirely by circumstantial evidence. * * * '[I]t is sufficient if all the evidence, taken together, satisfies the

jury beyond a reasonable doubt of the accused's guilt."

People v. Marino, 44 Ill.2d 562, 580, 256 N.E.2d 770, citing People v. Bernette, 30 Ill.2d 359, 367, 197 N.E.2d 436. It is true that the facts proved must be consistent with defendant's guilt and inconsistent with any reasonable hypothesis of innocence. This, however, does not require that guilt be proven beyond any possibility of a doubt. People v. Murdock, 48 Ill.2d 362, 367, 270 N.E.2d 21.

In the instant case the evidence established that on August 23, 1971, at 3:30 A.M., the window of the National Tea Co. store at 6611 South Halsted, Chicago, Illinois, had been broken. The two defendants were seen immediately prior to the crime walking in the direction of the store. After hearing the glass break, Officer Dorsey observed the two defendants standing in front of the store with the broken window. When the two defendants saw Officer Dorsey's marked police vehicle, they both fled down an alley to avoid arrest. Although the flight of an accused does not of itself raise a presumption of his guilt, still it is a circumstance tending to prove guilt. (People v. Hampton, 103 Ill. App.2d 57, 243 N.E.2d 371.)

The defendant Rucker's testimony that he did not hear the glass break and did not run from the scene of the crime was directly contradicted by the testimony of Officer Dorsey. Credibility of witnesses in a bench trial is for the trial judge to determine. People v. Wright, 3 Ill. App.3d 262, 278 N.E.2d 175. After hearing all the evidence in the instant case, the trial judge made the following finding:

Finding of guilty in both cases. The circumstantial evidence is so strong here as to refute any other conclusion.

Upon a careful consideration of all the evidence, we are satisfied that the evidence was sufficient to prove the defendants guilty of criminal damage to property beyond a reasonable doubt.

The defendant's second contention is that he was prejudiced by the consideration of other crimes when upon his case first being called the trial judge was informed that Rucker had three separate cases pending. In the instant case no evidence of other crimes was introduced into evidence at the defendant's bench trial. The only mention of other charges was made as a procedural matter when the case was first called prior to arraignment or trial. The defendant was in no way prejudiced.

The judgment is affirmed.

JUDGMENT AFFIRMED.

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CHICAGO BAR
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ASSOCIATION

56718

PEOPLE OF THE STATE OF ILLINOIS,
Respondent, Plaintiff-
Appellee,

v.

APPEAL FROM
CIRCUIT COURT
OF COOK COUNTY.

CHARLES DAVIS,
Petitioner, Defendant-
Appellant.

HONORABLE
JAMES J. MEJDA,
PRESIDING.

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Charles Davis, hereinafter "petitioner," was found guilty by a jury of the crime of murder and was sentenced to a term of 14 years to 25 years in the penitentiary. That judgment was affirmed on direct appeal. People v. Davis, 107 Ill. App.2d 162, 246 N.E.2d 83 (Lv. to App. den. 41 Ill.2d 582).

Petitioner then filed a pro se petition pursuant to the Post Conviction Hearing Act, (Ill. Rev. Stat. 1969, ch. 38, par. 122-1 et seq.) alleging the violation of certain of his constitutional rights, to which the State filed a motion to dismiss. After a hearing at which petitioner was represented by the Public Defender, the trial court sustained the motion and dismissed the petition. (This appeal was originally filed in the Illinois Supreme Court and transferred to this court.)

At the trial of the petitioner on the murder charge, the 13 year old son of the deceased woman testified that at about 5:45 P.M. on October 2, 1965, he observed the petitioner enter the premises occupied by the witness and the deceased, draw a knife and stab the deceased in the back, with no words having been exchanged. He further testified that he had known the petitioner for a period of about two years, that petitioner had been to the apartment in the past, but that the petitioner did not live there.

Petitioner testified at the trial that he had known the deceased about eight years; that during the day of October 2, 1965, he, the deceased and persons named "the Browns" had been drinking

alcoholic beverages; that he and the deceased, accompanied by one of the Browns, went to the apartment building where the deceased lived; that an argument arose between the petitioner and the deceased; that the deceased struck him with bottles and a knife; that during the altercation the deceased cut her hand; that the petitioner left and returned 15 minutes later to learn that the deceased had cleaned up the apartment; that he again left and was later informed that the deceased was dead; and that he fled to the State of Indiana where he was later apprehended.

On November 17, 1969, the petitioner filed the instant Post-Conviction Petition, alleging three grounds, only one of which was argued in the trial court and on appeal. It alleged that his counsel demonstrated his incompetence by refusing to subpoena as witnesses Pete Dean and Mrs. Clara Booker who could corroborate his version of the altercation with the deceased and that the deceased was still alive when the petitioner first left the deceased's apartment. The Public Defender representing petitioner told the court that he had tried unsuccessfully to locate Dean and Mrs. Booker.

At the hearing there was a dispute as to whether defendant's trial counsel was of his own choosing or was a court appointed lawyer. We believe that in this case it is immaterial.

The alleged incompetence of counsel was based on his failure to subpoena Dean and Booker as witnesses at trial. Reference was made to the opinion in People v. Davis, in which the court commented on the failure of defense counsel to produce the Browns who, according to defendant's testimony at trial, were the persons who were with him immediately prior to the murder. In addition to the statement of petitioner's counsel at the hearing below that he had been unable to locate Dean and Booker, there was never any indication in the trial record that they had been present at the

scene of the murder. Therefore, the failure to subpoena them as witnesses could hardly be the basis for a charge of incompetence of counsel. See People v. Ashley, 34 Ill.2d 402, 411, 216 N.E. 2d 126.

The order dismissing the post-conviction petition is affirmed.

AFFIRMED.



ABST.

55025

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
)	
v.	)	COURT OF COOK COUNTY.
)	
ANDREW PRIM,	)	Hon. Richard J. Fitzgerald,
	)	Presiding.
Defendant-Appellant.)	

PER CURIAM:

On August 10, 1966, Andrew Prim, hereinafter called defendant, was convicted of armed robbery on his plea of guilty and was placed on five years probation with the first year to be served in the House of Correction. On February 2, 1970, the defendant was found in violation of his probation and was sentenced to a term of 8 to 12 years in the Illinois State Penitentiary. The defendant now appeals from the sentence entered after the revocation of his probation.

The only evidence introduced at the hearing on the rule to show cause why defendant's probation should not be revoked was a stipulation that the defendant on June 26, 1969, had been convicted of the crime of murder under indictment #68-4420 and given a sentence of 35 to 70 years in the Illinois State Penitentiary.

On appeal the defendant raises only one argument, that his conviction of murder, which he has appealed directly to the Illinois Supreme Court, is void and, therefore, was improperly used as the basis upon which to violate his probation. Defendant in his reply brief, concedes that "If the defendant's conviction under Indictment No. 68-4420 is affirmed, this court should affirm the order revoking defendant's probation and sentencing him to the penitentiary."

On October 2, 1972, the Illinois Supreme Court affirmed the defendant's murder conviction under indictment #68-4420. People v. Prim, --Ill.2d--, --N.E.2d--, (No. 43274). (The

Illinois Supreme Court also reversed the defendant's attempt robbery conviction under indictment #68-4420 because it arose out of the same conduct as the murder.)

In light of the foregoing, the judgment of the trial court is affirmed.

Judgment affirmed.



No. 56551

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
vs.)	
)	
ROBERT WAYNE,	)	HONORABLE
	)	JOHN J. MORAN,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM:

The defendant, Robert Wayne, was found guilty after a bench trial of the offense of gambling, in violation of Section 28-1(a)(2) of the Criminal Code, and was fined the sum of \$135. (Ill.Rev.Stat. 1969, ch.38, par.28-1(a)(2).) On appeal he contends that his arrest and subsequent search without a warrant were unlawful, and that the People failed to prove his guilt beyond a reasonable doubt.

Defendant filed a pre-trial motion to suppress certain evidence. He testified at the hearing on that motion that on February 11, 1971, he was seated at the top of a stairway leading to the second floor of an office building located at 127 N. Dearborn Street in Chicago. He testified that a police officer placed him under arrest, took money from his person, and took him to the bottom of the stairway where he was searched.

Chicago Police Officer Duffy testified at the hearing that on the date in question he received information that a man named "Bobby" was "booking horses" at 127 N. Dearborn Street, that he was accompanied to the location by the informant, and that he observed the defendant approached by three persons, hold short conversations with them and accept from them pieces of paper and United States currency. The officer testified that he was not able to see what was written on the papers or the denominations of the currency, but that he observed the defendant place the currency in his pocket and place the papers in a brown paper bag situated at the bottom of the stairway. The officer testified that upon inspection of the bag he found it

to contain betting slips, that he questioned the defendant about the contents of the bag, and that the defendant denied any connection therewith.

The motion to suppress the slips of paper found in the paper bag as evidence was denied.

The matter proceeded to trial and it was stipulated between the parties that the evidence adduced at the hearing on the motion would stand as received in evidence at the trial. In addition, Officer Duffy testified that he served on the police force for a period of five years, that he served in the vice control division for one year, and that he had seen records of bets and gambling in the past. It was stipulated between the parties that it was the officer's opinion that the papers found in the paper bag represented bets on horse races. The officer also testified that in the bag with the slips of paper was found a racing form which was dated the same day as defendant's arrest. He stated that the defendant denied any knowledge of the contents of the bag, and that the defendant was placed under arrest.

On cross-examination of the officer it was brought out that he retained the contents of the bag, but that he threw the bag away; that several of the slips of paper in the bag did not represent bets; and that he later determined that horses which appeared on the sheets were running in races that day. On re-direct examination the officer explained that those slips of paper which did not represent bets were "slough sheets" or memoranda of monies owed by and to the defendant. The slips of paper and the racing form found in the paper bag were entered into evidence as People's Group Exhibit #1.

Defendant testified that he knew nothing of the bag or its contents, and that he was merely seated at the top of the stairway reading a magazine and waiting for a friend when he was placed under arrest.

The defendant initially contends that his arrest and the subsequent search were illegal.

The evidence adduced by the People at the hearing on the motion to suppress the slips of paper as evidence reveals that the officer had probable cause upon which to base an arrest of the defendant. Probable cause upon which to effect an arrest exists where the officer has knowledge of such facts and circumstances, and of which he has reasonable and trustworthy information, that would warrant a man of reasonable caution to believe that an offense has been committed and that the person sought to be arrested has committed that offense. (People v. Higgins, 50 Ill.2d 221, 227, 278 N.E.2d 68, 72.) In situations where an officer acts upon information supplied by an informer it is not always necessary to adduce evidence as to the informer's credibility or reliability; information supplied by a private citizen is not looked upon by the courts with the same reservation which attends information supplied professional informers. People v. Thompson, 3 Ill.App.3d 470, 278 N.E.2d 462.

In the instant case Officer Duffy was informed by a party, not shown to have been other than a private citizen, that a man was accepting bets on horses in a downtown Chicago office building. In the company of the informant the officer observed the defendant accept money and pieces of paper from three separate persons, place the money into his pocket, and place the slips of paper in a paper bag located a distance away. The officer had experience in the vice control division of the police department, and had observed records of bets and gambling. Under these circumstances the officer had probable cause upon which to effect the defendant's arrest without a warrant, and to execute the subsequent search. People v. Wexler, 116 Ill.App.2d 400, 254 N.E.2d 95.

The cases cited by defendant are inapposite to the instant case: People v. McCray, 33 Ill.2d 66, 210 N.E.2d 161; People v. McCrimmon, 37 Ill.2d 40, 224 N.E.2d 822; People v. Martin, 124 Ill.App.2d 70, 260 N.E.2d 364.

Defendant also contends that he was not proven guilty

beyond a reasonable doubt. He argues that the People failed to establish that the writing imprinted on the pieces of paper found by the defendant in the paper bag were wagers which were being accepted by the defendant.

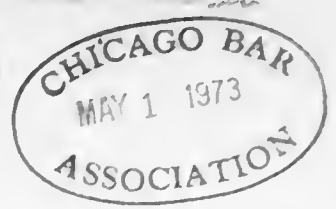
Officer Duffy testified that in his opinion the pieces of paper found in the paper bag were betting slips and "slough sheets." In the officer's experience he had seen records of bets and gambling. The papers found in the paper bag were introduced into evidence as People's Exhibit #1. The officer's testimony, together with the exhibit in evidence, were sufficient to prove that the defendant was engaged in accepting bets on horse races. See People v. Oberlander, 109 Ill.App.2d 469, 248 N.E.2d 805.

The case of People v. Galan, 110 Ill.App.2d 98, 249 N.E.2d 118, cited by the defendant, is not in point. In Galan the police raided a room and observed the defendant submerging sheets of water-soluble paper in a bathtub. The court held that although defendant's act was suspicious and raised a probability that he had been engaged in taking bets, that circumstance alone, in light of the fact that the sheets contained nothing more than the names of race tracks, horses and races, was not sufficient to sustain the conviction. In the instant case the defendant was seen accepting money and slips of paper, which he then placed into a paper bag and which bag the officer later found to contain a racing form, racing bets and "slough sheets."

For the above reasons the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Per Curiam.



56603

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,) APPEAL FROM THE CIRCUIT
) COURT OF COOK COUNTY.
v.)
)
EDWARD THOMAS,) HONORABLE JOHN J. CROWLEY,
) Presiding.
Defendant-Appellant.)

PER CURIAM (SECOND DIVISION, FIRST DISTRICT):

The defendant, Edward Thomas, was found guilty at a bench trial of the offense of theft in violation of Section 16-1(a) (1) of the Criminal Code, in that on July 19, 1971 he knowingly obtained unauthorized control over property belonging to Zayre's Department Store with the intent of permanently depriving Zayre's of the use and benefit of said property. (Ill. Rev. Stat. 1971, ch. 38, par. 16-1(a) (1)). He was sentenced to a term of four months in the House of Correction.

The sole issue raised by the defendant on appeal is that the People failed to prove the ownership of the property in someone other than the defendant himself.

Ownership, or some form of superior possessory interest by one other than the defendant, is an essential element of the offense of theft. (People v. Roach, 1 Ill. App.3d 876, 275 N.E.2d 309). In the case at bar the State made no direct attempt to prove that element. However, the elements of the offense of theft may be established by circumstantial evidence. (People v. Smith, 90 Ill. App.2d 388, 234 N.E.2d 161). The testimony of the State's sole witness, a security guard for Zayre's Department Store, revealed that defendant was arrested as he exited from the store carrying ten pairs of men's pants in a "closed-up" Zayre's bag. Defendant had made no attempt to pay for the pants, no sales slip was in the bag, and no permission had been given defendant to appropriate the pants. We believe that

this testimony constituted sufficient circumstantial evidence to support a conclusion by the trier of fact that, beyond a reasonable doubt, the pants were owned by the Zayre's Department Store. To be sure, the State's presentation as to the element of ownership was weak. Nonetheless, its elicitation, albeit inadvertent, of circumstantial evidence bearing on the issue requires that we defer to the trier of fact. We affirm.

AFFIRMED.



ABST.

9 1A³ 385

56818

PEOPLE OF THE STATE OF ILLINOIS,)
)
Respondent-Appellee,) APPEAL FROM THE CIRCUIT
) COURT OF COOK COUNTY.
vs.)
)
FREDDIE JACKSON,) HONORABLE NATHAN M. COHEN,
) Presiding.
Petitioner-Appellant.)

PER CURIAM (SECOND DIVISION, FIRST DISTRICT):

Freddie Jackson, petitioner, was convicted by a jury in the Circuit Court of Cook County of the offense of rape (Ill. Rev. Stat., 1963, ch. 38, par. 11-1), and was sentenced to a term of 20 to 40 years in the Illinois State Penitentiary. On direct appeal, the conviction was affirmed by this court. (People v. Jackson, 103 Ill. App.2d 209, 243 N.E.2d 551). Subsequently petitioner filed a petition under the Post-Conviction Hearing Act (Ill. Rev. Stat., 1967, ch. 38, par. 122-1) and his appointed counsel filed a supplemental petition, which was dismissed without a hearing.

In substance the petition alleged: (1) that the petitioner was the victim of an illegal search and seizure; (2) that he was convicted through the knowing use of perjured testimony; (3) that his sentence constitutes cruel and unusual punishment. At the hearing on the motion to dismiss, the only point argued by counsel was the illegal search and seizure. Thereafter the trial judge granted the State's motion to dismiss. On appeal, the petitioner argues that the trial court erred in dismissing his post-conviction petition because the court did not rule on two grounds stated in the petition, but based its ruling solely upon the alleged illegal search and seizure.

On review, the question presented to the court is not the correctness of the reasoning of the trial judge, but the correctness



of the result. People v. Smith, 40 Ill.2d 140, 239 N.E.2d 814. In the case at bar, the petition was dismissed without a hearing. The only issue presented for review is whether that dismissal was proper.

To merit a hearing under the Post-Conviction Hearing Act, a petition must make a substantial showing that the petitioner's constitutional rights have been violated. (People v. Arbuckle, 42 Ill.2d 177, 246 N.E.2d 240; People v. Brown, 41 Ill.2d 503, 244 N.E.2d 159). The petitioner alleges that two arguments in his petition present substantial constitutional questions. The first is the State's knowing use of perjured testimony. Assuming, as we believe the lower court did, that fundamental fairness allows us to look at the merits of the allegations, we will not rely on the waiver doctrine to bar assertions of constitutional rights. (Ciucci v. People, 21 Ill.2d 291, 171 N.E.2d 34; People v. Hamburg, 32 Ill.2d 291, 205 N.E.2d 456). The petition alleges that Judy Lichtenstein, the corroborating witness, testified in a rape case prior to the defendant's trial which was dismissed nolle prosequi, and that the police reports contain notations that the police officers did not believe Miss Lichtenstein. These allegations are irrelevant to the case at bar. Even if admissible, they could at best go only to the weight to be given her testimony. (See 3 WIGMORE ON EVIDENCE Sec. 863; Elliot v. Brown, 349 Ill. App. 428, 111 N.E.2d 169; Ryan v. Manson, 33 Ill. App.2d 406, 179 N.E.2d 449). The knowing use of false testimony, even if it goes to the credibility of the witness, violates due process. (Napue v. Illinois, 360 U.S. 264, 3 L.Ed.2d 1217, 79 S.Ct. 117). However, in the case at bar, there has been no showing of false testimony. Purported inherent probabilities or inconsistencies in the witness's testimony present a question of weight and credibility and not a constitutional issue. (People v. Doherty, 36 Ill.2d 286, 222 N.E.2d 501; People v. Rose, 43 Ill.2d 273, 253 N.E.2d 273).

The petitioner's second allegation is that his sentence of 20 to 40 years constitutes cruel and unusual punishment. This sentence is within the statutory range and was, as we held in petitioner's direct appeal, justified under the facts of this case. (107 Ill. App.2d 209). Petitioner's allegation is thus basically the same as advanced in his appeal and has been adjudicated. Therefore, no substantial constitutional issue was properly before the court. (People v. Washington, 45 Ill.2d 477, 259 N.E.2d 276; People v. Ward, 48 Ill.2d 117, 268 N.E.2d 692). In addition, a sentence for a term of years within the maximum set by statute is not cruel and unusual punishment prohibited by our constitution. (People v. Rose, 43 Ill.2d 273, 253 N.E.2d 456; People v. Forg, 385 Ill. 389, 52 N.E.2d 699).

The petitioner's post-conviction petition did not present a substantial constitutional question and was properly dismissed without a hearing. For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

ABST.



MAY 1 1973

MAY 1

57520

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE
)	
vs.	)	CIRCUIT COURT OF
)	
WALTER NAHIRNEY,	)	COOK COUNTY.
)	
Defendant-Appellant.	)	Hon. George E. Dolezal,
	)	Presiding.

MR. JUSTICE ADESKO delivered the opinion of the court:

Defendant, Walter Nahirney, pleaded guilty to charges of attempted murder, aggravated battery and aggravated assault. The trial judge sentenced defendant to serve one to three years in the penitentiary. The sole contention on appeal is that defendant should have been granted probation.

On July 26, 1970, at 9:30 p.m. officer Reginald Williams and his partner, responded to a disturbance complaint at 7733 South Peoria. Officer Williams heard shots fired and radioed for help. Many shots were fired by the defendant from the house and Williams was hit in the thigh. Defendant continued to shoot at Williams as he crawled to a squad car. Officer Williams' wound required surgery and he was on medical leave from the Police Department for forty-four days. Defendant exchanged shots with other police officers and later was forcibly taken into custody.

Defendant contends that he should have been granted probation. The cases cited by defendant in support of his argument are not in point. In the case at bar, defendant committed a violent crime by shooting at police officers. Defendant shot officer Williams in the thigh and continued to shoot at the wounded police officer as he was crawling

to a squad car. Defendant had previously been arrested for disorderly conduct.

The sentence imposed on defendant was within the statutory limits imposed by the legislature and was lenient in view of the crime committed by defendant. We find that the sentence was not excessive and that the trial court was not in error in denying defendant's request for probation.

JUDGMENT AFFIRMED.

DIERINGER, P.J., and BURMAN, J., concur
(Abstract Only)

ABST.

91A³ 397



56568

PEOPLE OF THE STATE OF ILLINOIS,) APPEAL FROM
Plaintiff-Appellee,)
vs.) CIRCUIT COURT,
Denny Fizer,) COOK COUNTY.
Defendant-Appellant.) HON. DANIEL WHITE,
Presiding.

MR. JUSTICE BURKE delivered the opinion of the court:

Denny Fizer was found guilty in a bench trial of the offense of unlawful use of weapons, and sentenced to six months in the House of Correction. Ill.Rev.Stat. 1969, ch. 38, par. 24-1(a)(4). The sole issue is whether the search was lawful under the Illinois "Stop and Frisk" statutes. Ill.Rev.Stat. 1969, ch. 38, par. 107-14; par. 108-1.01. Par. 107-14 provides:

"A peace officer, after having identified himself as a peace officer, may stop any person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that the person is committing, is about to commit or has committed an offense as defined in section 102-15 of this Code, and may demand the name and address of the person and an explanation of his actions. . . ."

Paragraph 108-1.01 provides:

"When a peace officer has stopped a person for temporary questioning pursuant to section 107-14 of this Code and reasonably suspects that he or another is in danger of attack, he may search the person for weapons. . . ."

At trial, Chicago Police Officer Riordan testified that on August 9, 1971, at 8:30 in the evening, he responded to a radio assignment that there was a man with a gun at a tavern at 61st and Calumet, dressed in a brown undershirt and brown trousers; at 61st and Calumet he observed the defendant sitting on a fire plug, wearing a brown undershirt and brown trousers, and holding a brown jacket on his lap; he approached him from the rear, announced his office, asked him to stand and searched him. He found

a .32 caliber revolver in the right front pocket of the defendant's jacket; approximately five people were on the corner in the vicinity; nobody but the defendant was "dressed the way the description was given"; he did not see a gun when he arrived.

These statutes cited were upheld in People v. Lee, 48 Ill.2d 272, 279, 269 N.E.2d 488, 492, where the court noted that the "intent of the legislature was to codify the holdings of the United States Supreme Court in" Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889 and Sibron v. New York, 392 U.S. 40, 20 L.Ed. 917, and quoted the following language from Terry v. Ohio:

"We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating the behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stage of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." 48 Ill.2d 275, 276, 269 N.E.2d 488, 490.

In Lee, the officers stopped six men, talked with them briefly, then conducted "a pat search for the officers' protection," and discovered a shot gun shell. The circumstances were that a "gang war" in the area was expected that night, and several loud reports like revolver shots or shot gun discharges were heard; two minutes later and two blocks away the officers saw the group of six men, four of whom wore the "red tams or berets" that identified them as members of one of the gangs expected to be involved in the "gang war." The search was held to be lawful.

In People v. Staples, 1 Ill.App.3d 922, 275 N.E.2d 259, a Chicago police officer, whose superior had informed him "of several hotel robberies perpetrated in the vicinity of the Chicago Stadium" and given him "a general description of the suspect," was driving in the vicinity of the Chicago Stadium about 3:05 A.M. when he saw "a man walking on the street who fit the description of one of the" robbers. When the officer announced his office, the defendant became "fidgety" and was "moving his hands around" so the officer "instigated a search." The court held that because defendant Staples appeared extremely nervous and "seemed to be reaching for his pocket, or moving his hand around his coat," the police officer acted lawfully in touching the defendant to pat him down.

Officer Riordan acted properly in this case. Unlike the police officers in Lee, who had no description at all, and the officer in Staples, who had only "a general description," the officer here had a specific description of the suspect's appearance: the suspect's sex, the way in which he was dressed, the color of his clothes and the exact location of the suspect. According to the report the officer had received, the suspect was a man who had a gun at a tavern at 61st and Calumet; this was a dangerous combination if the report proved to be true, and the officer was wholly justified in approaching the situation with caution as he did. He had every reason to believe, as the United States Supreme Court said in Terry v. Ohio, that the suspect was "armed and presently dangerous." With appropriate caution, Officer Riordan "approached him from the rear" and announced his office, as the decisions of the courts and the applicable statutes said he should. The weapon was found in the defendant's outer clothing,

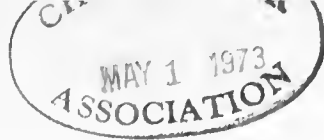
his coat, which was "on his lap," so there is no question here about the scope of the search.

Considering all the circumstances, the officer acted properly, the search was valid and the defendant's motion to suppress was, properly denied.

The judgment is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG, P.J., and EGAN, J., concur.



ABST. 9 11 3 401

56938

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
v.)	
)	
HENRY LOUIS WILLIAMS,	)	HONORABLE EARL E. STRAYHORN,
	)	Presiding.
Defendant-Appellant.)	

MR. JUSTICE EGAN delivered the opinion of the court:

The defendant pleaded guilty to an indictment charging him with murder and aggravated battery on October 4, 1971 in the circuit court of Cook County. He was sentenced to a term of fourteen to twenty years in the penitentiary for murder and one to seven years for aggravated battery, both sentences to run concurrently. On appeal the defendant contends: the trial court failed to properly admonish him on his plea of guilty under Illinois Supreme Court Rule 402, Ill.Rev.Stat., 1971, Ch. 110A, Par. 402; he was prejudiced when the State in aggravation informed the trial judge that he had previously been given court supervision; and the State failed to keep a plea bargaining agreement.

On September 27, 1971, a jury trial began and five witnesses testified. On October 4, 1971, the defendant requested a conference. After the conference, the defendant pleaded guilty.

The defendant first argues that his plea of guilty was improperly accepted because he was not specifically informed that he had a right to confront witnesses against him under Illinois Supreme Court Rule 402. This same contention was rejected in People v. Mendoza, 48 Ill.2d 371, 270 N.E.2d 30, wherein the court held that Supreme Court Rule 402 requires only substantial compliance with its provisions. When he pleaded guilty, the defendant stated that he knew the charge



and the sentence he would receive on his plea of guilty. He stated that he understood the jury would have to be dismissed, that no force or duress was used upon him, and that his plea of guilty was a free and voluntary act. The trial judge informed the defendant that he could be given a sentence of fourteen years to any number of years or death. The defendant persisted in his plea of guilty, which was then accepted by the court. The plea in the instant case substantially complied with Illinois Supreme Court Rule 402. Parenthetically, we note that all the State's witnesses except the Coroner's Physician had in fact testified and had been cross-examined.

The defendant next argues that the trial judge considered improper evidence in sentencing him when the assistant State's Attorney told the court that the defendant had previously been given court supervision. The defendant seeks reversal and, in the alternative, a reduction in his sentence. The trial judge is presumed to recognize any incompetent evidence introduced at the presentence hearing and disregard it. People v. Fuca, 43 Ill.2d 182, 251 N.E.2d 239; People v. Bey, 51 Ill.2d 262, 281 N.E.2d 638. In the case at bar, the sentence imposed upon the defendant was the negotiated sentence that the defendant knew he would receive prior to his plea of guilty. The defendant's minimum sentence is the minimum sentence for the crime of murder. The circumstances of this case do not warrant a reversal or permit a reduction of sentence. People v. Westley, 5 Ill.App.3d 668, 284 N.E.2d 17.

The defendant argues that the State in the conference agreed or acquiesced to a sentence of 14-20 years and then broke its word by recommending a sentence of 40-80 years. After the conference,

the trial judge in open court stated that in the conference both sides made separate recommendations and he had indicated the sentence he would impose upon a plea of guilty. The record fails to show that the State's recommendation at the plea of guilty was any different than its recommendation in the conference. In any event, the defendant on his plea of guilty was given the exact sentence promised by the trial judge.

For the foregoing reasons, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG, P.J. and BURKE, J. concur.

Lot 53 and the East half of
Lot 54 in Villa Crest, a Subdivision
in Section 24, Township 45 North,
Range 11, East of the 3rd P.M.,
according to the plat thereof,
recorded November 20, 1925, as
Document 269471, in Book "O"
of Plats, page 83, in Lake County,
Illinois

upon receipt of said package, your invoice and our
pay out authorization form (including waiver of lien
and affidavit) approved and signed by yourselves,
Har-Edwards Development Company and Mr. and Mrs.
Donald D. Makela, and ourselves, and will take a
2% discount on the base package price, or pay net
amount within 45 days.

Very truly yours,

Signed /George H. Francis
FIRST VICE PRESIDENT

cc: Har-Edwards Development Co., Inc."

Thereafter, Kingsberry delivered the home package and the
Makela's home was, presumably, completed. In July, 1969, Liberty-
ville received an invoice from Kingsberry showing a balance due of
\$4339.12; an executed waiver of lien and affidavit; and a pay out
authorization. The pay out was signed by Har-Edwards and the
Makelas but not by Kingsberry. Libertyville maintains that these
documents were delivered to them by Har-Edwards whereas Kingsberry
testified that they were mailed directly to the savings and loan.
In any event, Libertyville proceeded to pay the amount of Kingsberry's
invoice to Har-Edwards and, needless to say, no payment was received
by Kingsberry. No further communication was received by Libertyville
from Kingsberry until January, 1970, when payment was demanded on

evidence that the parties intended that Kingsberry's invoices would
whose credit Kingsberry had rejected.
be paid through a third party, / The determination of the trial court
that the payment to Har-Edwards constituted a breach of the agreement
is well supported by the record and will not be disturbed.

We are also unable to agree that Kingsberry, by reason of the
prior transactions, was estopped from requiring direct payment of
their invoices or placed Har-Edwards in the position of their apparent
or implied agent to collect the sums due them under the agreement.

Estoppel is said to arise when a party, through his conduct,
induces another to act in a certain way in reasonable reliance on
that conduct. (Moline I.F.C. Finance, Inc. v. Soucinek, 91 Ill.
App. 257, 234 N.E. 2d 57; Shapera v. Fargo, 240 Ill. App. 145.)
Libertyville would have us hold that Kingsberry, by accepting payment
of the Soderquist package through Har-Edwards, was estopped from
seeking direct payment of their later invoice as provided in the
letter of credit.

Aside from the fact that Kingsberry was apparently unaware of
the source of payment for the Soderquist package, its conduct could
not be considered the basis for the application of the doctrine of
estoppel. Because one payment had been made through Har-Edwards,
Libertyville could not reasonably conclude that Kingsberry did not
look to them, ultimately, for the payment of their invoices as
previously agreed by the parties.

An implied or apparent agent has been defined as a person

the basis of the May 31 letter. It was the opinion of the trial court that the letter was a binding contract wherein Libertyville promised to pay Kingsberry's invoice directly to them which they breached when they "unilaterally" undertook to make the payment to Har-Edwards.

Libertyville contends that the contract, when interpreted in the light of prior transactions between the parties, did not require direct payment to Kingsberry but only a promise that funds "would be available"; or that Kingsberry was estopped from demanding direct payment by its prior conduct and its delivery of the waiver of lien; or that Kingsberry had clothed Har-Edwards with apparent authority to collect the funds due them for the delivery of the home package. All three contentions are based, to an extent, on two prior transactions between Libertyville, Har-Edwards, Kingsberry and, of course, other home owners.

In late 1968 and early 1969, Har-Edwards constructed a home for a Mr. and Mrs. Mennenoh. As in our case, the material for the home was forwarded by Kingsberry on the basis of a letter of credit from Libertyville. In that instance, Kingsberry mailed all of its documents directly to Libertyville and received payment of their invoice directly from them. In the second transaction, also in 1969 and involving a Edwin Soderquist, there is a dispute whether Kingsberry delivered its documents directly to Libertyville or through Har-Edwards. In that case, Libertyville paid Kingsberry's

invoice to Har-Edwards who forwarded the funds to them. Kingsberry's credit manager testified that they were not aware who forwarded the payment for the Soderquist package and that he considered it irrelevant so long as they were paid.

Libertyville agrees that the purpose of the letter of credit was to assure Kingsberry that a financial institution was making funds available for the transaction. They argue, however, that the agreement as to whom the funds were to be paid is ambiguous and that the contract should therefore be interpreted in the light of the prior transactions between the parties. We do not agree, however, that the agreement can be considered ambiguous in view of its admitted purpose. The letter, as we have seen, stated "...we agree to pay your invoice..." upon delivery of the house package and the other documents. If the purpose of the letter were to assure Kingsberry that they would receive payment, obviously the payment would have to be made directly to them and not to the very party whose credit they refused to recognize.

Even if, for the sake of argument, we agreed that the agreement was ambiguous, we fail to see that the prior transactions between the parties would support the interpretation advanced by Libertyville. In the Mennenoh transactions, Libertyville paid Kingsberry's invoice directly. In Soderquist, Libertyville paid Har-Edwards without any authorization whatsoever to do so and without the knowledge of Kingsberry. Certainly this conduct could not be considered serious

evidence that the parties intended that Kingsberry's invoices would
whose credit Kingsberry had rejected.
be paid through a third party,/ The determination of the trial court
that the payment to Har-Edwards constituted a breach of the agreement
is well supported by the record and will not be disturbed.

We are also unable to agree that Kingsberry, by reason of the
prior transactions, was estopped from requiring direct payment of
their invoices or placed Har-Edwards in the position of their apparent
or implied agent to collect the sums due them under the agreement.

Estoppel is said to arise when a party, through his conduct,
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that conduct. (Moline I.F.C. Finance, Inc. v. Soucinek, 91 Ill.
App. 257, 234 N.E. 2d 57; Shapera v. Fargo, 240 Ill. App. 145.)
Libertyville would have us hold that Kingsberry, by accepting payment
of the Soderquist package through Har-Edwards, was estopped from
seeking direct payment of their later invoice as provided in the
letter of credit.

Aside from the fact that Kingsberry was apparently unaware of
the source of payment for the Soderquist package, its conduct could
not be considered the basis for the application of the doctrine of
estoppel. Because one payment had been made through Har-Edwards,
Libertyville could not reasonably conclude that Kingsberry did not
look to them, ultimately, for the payment of their invoices as
previously agreed by the parties.

An implied or apparent agent has been defined as a person

who, whether authorized or not, reasonably appears, because of the acts of another, to be authorized to act for such other person.

Alterman v. Lydick, 241 F. 2d. 50 (7th Cir). As pointed out on page 53 of the Alterman decision:

"...as is well settled, it is necessary that there be such manifestation on the part of the principal as would lead a reasonably prudent person to believe that the agent was acting within the scope of his authority. "

In view of the admitted purpose of the letter of credit, it is difficult for us to perceive such "manifestation" on the part of Kingsberry that would lead Libertyville to believe that Har-Edwards was their agent for purposes of receiving payment. Under these circumstances, it is not surprising that the trial court obviously concluded that an agency, either implied or by estoppel, did not exist.

It is our opinion that the finding of the trial court that Libertyville breached its contract with the plaintiff and the judgment entered thereon was correct and should be affirmed.
AFFIRMED.

GUILD, P. J. and WOODWARD, J. Concur.

72-89

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Acting Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable GLENN K. SEIDENFELD, Justice
HOWARD K. KELLETT, Clerk
JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

January 12, 1973 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

FILED

No. 72-89

JAN 12 1973

HOWARD K. KELLETT, Clerk
Appellate Court, 2nd District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the Circuit
	)	Court of the Nineteenth
	)	Judicial Circuit, Lake
RICHARD WALLACE,	)	County, Illinois.
)	
Defendant-Appellant.)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

The defendant, Richard Wallace, was convicted in a bench trial of driving while his license was revoked in violation of Ill.Rev.Stat. 1969, ch.95½, par.6-303. The only question raised by defendant in his appeal is whether the following certificate of the Secretary of State, which was admitted in evidence but unaided by any other testimony in the record, is sufficient to prove beyond any reasonable doubt that the revocation of defendant's license was in effect on January 16, 1971, the date of the alleged offense:

RICHARD B WALLACE

W420-7423-8213

0350

P. 12

07-27-38 M 01-26-71 01-26-71

THE FOLLOWING INFORMATION IS FURNISHED FROM THE DRIVERS LICENSE FILE OF THE PERSON IDENTIFIED ABOVE, PURSUANT TO THE PROVISIONS OF THE ILLINOIS VEHICLE CODE.

RICHARD B WALLACE

W420-7423-8213

2545 SEQUOIT

WAUKEGAN

07 27

SEX	HEIGHT	WEIGHT	HAIR	EYES
M	5'09	160	BRN	BLUE

TYPE	ISSUE DATE	CLASS	RESTRICTION	EXPIRATION DATE
3	01-31-69	B *	0-0-0	07-27-71

No valid license or permit

TYPE OF ACTION	DATE OF ARREST	DATE OF ACTION	DESCRIPTION OF ACTION	ACCIDENT OR DOCKET NO	TERMINATION DATE OF SUSPENSION	STC IN EFFECT
03		11 24 60	6 206 A2			6 NC
73		05 24 61	6 206 A2			
99	06 30 61	09 19 61	1 049 05	673464		
99	08 22 61	09 19 61	1 062 00	12539		
03		11 03 61	6 206 A2		11 03 62	NC
73		11 03 62	6 206 A2			
99	10 26 62	11 23 62	1 069 00	7833		
99	04 23 63	04 23 63	1 049 06	15897		
99	10 20 63	10 20 63	1 049 03	615758		
02		01 16 64	6 206 A2			ND
74		11 19 65				
99	09 07 67	10 05 67	2 049 03	8920		
99	01 01 68	01 11 68	2 086 00	9374		
99	03 26 68	05 17 68	1 049 01	3608		
03		07 19 68	6 206 A2		01 19 69	NC
99	05 25 68	07 30 68	1 049 05	5178		
73		01 19 69	6A206 A2			
99	03 10 69	03 17 69	7 252 00	5717945		
02		05 06 69	6A206 A3			YES
47		05 06 69				
97	01 29 69	03 24 69	7 218 00	6285773		
94	03 07 70	03 23 70	6A210 02	12471		
96	03 14 70	06 19 70	6A101 00	17265		
99	03 14 70	06 19 70	2 103 00	17266		

I certify that to the best of my knowledge and belief, after a careful search of my records, the information set out herein is a true and accurate copy of the original information furnished by drivers license number, and I certify that all necessary notices required as a result of any driver control action taken have been properly given.

P. 12

(SEE REVERSE FOR EXPLANATION OF CODES AND COLUMN HEADINGS)

John W. Lewis
Secretary of State

65L

Applying the legend which is printed on the reverse side of the certificate, the document shows that defendant's license was revoked on May 6, 1969, and that he was subsequently convicted of driving after his license was revoked and before a new license has been obtained, violating a local ordinance, and driving without a license. These last two convictions were dated June 19, 1970, and were the last entries on the certificate. The words "No valid license or permit" are typed in black on the certificate in contrast to the other entries which appear to be a blue-ink computer read-out.

Defendant contends that the certificate shows only that his license was revoked through June 19, 1970, the date of the last entry and does not reflect the status of the license on January 16, 1971. Thus, he argues, the State has failed to establish that the license was not restored during the subsequent period. The State counters that the certificate shows the status of defendant's license as of "01-26-71", the date printed at the top, and that the word "Yes" in the "Stop in Effect" column relates to that date.

Section 6-118(f) of the Illinois Vehicle Code (Ill.Rev.Stat. 1969, ch.95½, par.6-118(f)) provides that the abstract issued by the Secretary of State shall be prima facie evidence of the facts therein stated. A certified copy of the record is admissible in evidence. People v. Manikas (1969), 106 Ill.App.2d 315.

Driving privileges are not automatically restored; one who has had his driver's license revoked must re-apply, qualify for, and have issued to him, a new operator's license before he is properly licensed to drive. (People v. Suddoth (1964), 52 Ill. App.2d 355, 358.) It is obvious that no periodic entry would be made to show that a revocation is still in effect. As is evidenced in the case of a previous revocation of defendant's license

on January 16, 1964, an entry would appear if defendant had received a new license. (Entry of November 19, 1965). No such entry appears here. We conclude that the date at the top of the certificate must be taken to indicate that the certificate reflects defendant's record through January 26, 1971, and that the revocation was still in effect as of that date. Defendant offered no evidence to contradict the prima facie case made by the certificate. The certificate was therefore sufficient to prove beyond a reasonable doubt that the revocation of defendant's license was in effect on January 16, 1971, the date of the alleged offense.

Defendant has also argued that even if the certificate shows that his license was revoked on the date in question, there was no proof that defendant was notified of the revocation as required under the terms of Ill.Rev.Stat. 1969, ch.95½, secs. 6-206(c); 6-209. However, there is a certification by the Secretary of State on the abstract of the driver's record that "all statutory notices required as a result of any driver control action taken have been properly given". Again, this was prima facie proof that notice was given and this was not contradicted. Defendant at no time claimed that he did not receive notice, but argued that the State was required to prove that notice had been given. In our view, the proof was made by the admission of the certificate.

The judgment below is affirmed.

Affirmed

ABRAHAMSON, J. and THOMAS J. MORAN, J. concur.

56024

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
vs.)
)
HARVEY JONES,)
)
Defendant-Appellant.)

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY.

HONORABLE
KENNETH R. WENDT,
PRESIDING.

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Defendant was found guilty in a bench trial of the offense of armed robbery and sentenced to a term of not less than two nor more than five years. (Ill.Rev.Stat. 1969, ch. 38, par. 18-2.) On appeal he contends that the evidence failed to prove him guilty of the offense beyond a reasonable doubt.

The State introduced evidence which, if believed, established all the necessary elements of the crime charged. Defendant was identified as the person who leaned into the front seat of a car in which the victim was seated. As he did so, he was holding a tire iron while his friend, who was also indicted, took the victim's wallet (containing \$104) at knife point.

In addition, defendant's presence at the scene of the robbery, and his subsequent arrest in the company of his friend, who was in possession of proceeds of the robbery and had a tire iron and a knife in his car, all imply a common purpose rendering him legally accountable for the conduct of his co-indictee.

No error of law appears, and an opinion by this court would have no precedential value. While there is conflicting testimony, the evidence which was obviously believed by the judge as the trier of fact leaves no reasonable doubt as to defendant's guilt. The judgment is accordingly affirmed.

A F F I R M E D.

(Publish abstract only.)



MAY 1 1973



MA J 72

56232

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
) Appeal from the Circuit
)
v.) Court of Cook County.
)
)
)
MICHAEL STARK,)
)
) Kenneth R. Wendt, J.
Defendant-Appellant.)

PER CURIAM.

The defendant, Michael Stark, was found guilty, after a bench trial, of the unlawful use of weapons in that he knowingly possessed a shotgun with a barrel of less than 18 inches in length, in violation of section 24-1 (a-7) of the Criminal Code (Ill.Rev. Stat., 1969, ch. 38, para. 24-1 (a-7)), and was sentenced to a term of not less than one year nor more than five years in the Illinois State Penitentiary.

On appeal the defendant limited his argument to whether the trial court conducted a proper hearing in aggravation and mitigation; and whether the trial court erred in sentencing the defendant to a mandatory term of one to five years in the Illinois State Penitentiary.

Defendant argues that "it was error for the trial court to sentence a 19-year-old first offender to the penitentiary

without giving the defendant an opportunity to present evidence of mitigation." He further argues that there is no evidence that defendant waived his right to a hearing in mitigation; and that if such a hearing was held it "might indicate that probation was indeed warranted." Defendant cites the case of People v. Sessions (1968) 95 Ill.App.2d 17, 238 N.E.2d 94, where the court held that a hearing in aggravation and mitigation is a mandatory procedure prior to the imposition of sentence. However, in People v. Parr (1970) 130 Ill.App.2d 212, 264 N.E.2d 850; People v. Riso (1970) 129 Ill.App.2d 356, 264 N.E.2d 236, and People v. Smith (1965) 62 Ill.App.2d 73, 210 N.E.2d 574, this court held that the defendant's failure to request a hearing in aggravation and mitigation constituted a waiver of his right to such a hearing. See also, People v. Nelson (1968) 41 Ill.2d 364, 243 N.E.2d 225.

In the case at bar the record shows that the defendant had an opportunity to present evidence in mitigation but failed to do so. The trial judge asked if there was anything in aggravation. The assistant State's attorney stated that according to Officer Thompson the defendant had one arrest, but that Thompson was not certain whether there was a conviction. The assistant public defender stated that his "record indicates no convictions, merely arrests."

In light of the foregoing, defendant's contention that he is entitled to a mandatory hearing in mitigation is without merit. He waived such a hearing. The record affirmatively shows that the

defendant had an opportunity to present evidence in mitigation and that his counsel did make a statement in mitigation. Defendant had the burden of presenting additional evidence, if any was available. His failure to do so constituted a waiver of his right to a further hearing in mitigation.

The defendant also argues that it was error for the trial court to "foreclose all inquiry" as to the question of probation. The defendant states that because the prosecution presented no evidence of prior criminal convictions the defendant appeared before the court as a first offender. However, the record does not show that the defendant ever filed an application for probation. Further, the only time the word "probation" was used was when the court said that "this calls for a mandatory sentence. There is nothing I can do about it. One to five years in the State Penitentiary" and the Assistant Public Defender remarked "there is also probation" and the court answered, "I know that, but you have a loaded shotgun here, in aggravation." This discussion discloses that the trial court did consider the question of probation, but rejected the proposal because the defendant had a loaded sawed-off shotgun in his possession when he was arrested.

In the light of the foregoing, it is apparent that the trial court did not abuse its discretion when it refused probation and sentenced the defendant to one to five years in the State Penitentiary. (People v. Henderson (1971) 2 Ill.App.3d 401,

276 N.E.2d 64; People v. Wendt (1969) 104 Ill.App.2d 192, 244 N.E.2d 384; People v. Burdick (1969) 117 Ill.App.2d 314, 254 N.E.2d 148.)

The cases cited by defendant are not pertinent. In People v. McAndrew (1968) 96 Ill.App.2d 441, 239 N.E.2d 314, the court went outside the record and permitted his own prejudices and predilections to influence his decision. In People v. Carleton (1969) 116 Ill.App.2d 450, 252 N.E.2d 702, the court reversed and remanded the cause to the trial court to reconsider the application for probation because the legislature had, subsequent to the defendant's conviction, made a policy determination to mitigate penalties in certain instances with reference to possession of marijuana.

In the case at bar, the trial court acted within its sound discretion in denying the probation and imposing the sentence.

There is no reversible error in the record and, therefore, the judgment is affirmed.

Judgment affirmed.

56492

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,) APPEAL FROM THE CIRCUIT
)
v.) COURT OF COOK COUNTY.
)
STEVE BELL,) Hon. John J. Crowley,
) Presiding.
Defendant-Appellant.)

PER CURIAM:

Steve Bell, Joseph Baldridge and Victor Baldridge were charged with theft in violation of §16-1(a) of the Criminal Code, in that they took a bag of groceries and eyeglasses from Mr. James Jackson. Ill.Rev.Stat. 1971, ch.38, par.16-1 (a). After a bench trial all three men were found guilty. Steve Bell and Victor Baldridge were placed on one year's probation with the first four months to be served in the House of Correction. Joseph Baldridge was placed on one year's probation with the first fifteen days in the House of Correction. Steve Bell now appeals.

On appeal Bell contends that he was not proven guilty beyond a reasonable doubt because the evidence did not establish that he intended to permanently deprive the complainant of his property. He also contends that the terms of his probation are excessive.

The victim, Mr. James Jackson, testified that on August 2, 1971, at 12:15 a.m., he left the grocery store at Washington and Pulaski, Chicago, Illinois. As he left the store holding a bag of groceries the three defendants approached him. Victor Baldridge grabbed Mr. Jackson's arm and twisted his arm saying "Let me see what you have." Joseph Baldridge then grabbed the bag of groceries and began looking through the bag. At the same time Steve Bell held Mr. Jackson by the shoulder. Victor Baldridge took Mr. Jackson's glasses and smashed them.

Officer Tyse testified that on August 2, 1971, he and his partner were in plain clothes in an unmarked car driving north on Pulaski. The officer observed the three defendants

ABST.





surrounding Mr. Jackson and observed Victor Baldrige grabbing Mr. Jackson by the arm. All three defendants were immediately arrested.

Steve Bell testified that as Jackson left the store he bumped into Victor Baldrige and Victor said "Hold it man," and that nothing else occurred. No one grabbed Jackson or his groceries.

Victor Baldrige testified that Mr. Jackson bumped into him; that he said nothing; that Mr. Jackson pushed him and he pushed back, causing Mr. Jackson's glasses to fall.

Joseph Baldrige testified that he was facing the other direction and saw nothing occur between Victor and Mr. Jackson.

The defense first argues that the State failed to prove that Bell intended to permanently deprive Mr. Jackson of his groceries and eyeglasses because the record shows that only a scuffle occurred and the items fell to the ground during the scuffle, and because Bell never came into physical contact with the stolen items. It is well established that in a trial for theft intent may and often must be established from the facts and circumstances surrounding the alleged criminal act. People v. McClinton, 4 Ill.App.3d 253, 280 N.E.2d 795. In the case at bar, the testimony of Mr. Jackson, which was corroborated by Officer Tyse, showed that the three defendants asked about, took and began to search the bag of groceries. These acts are sufficient to show intent to permanently deprive the owner of those goods. Further, the defendants deliberately smashed Mr. Jackson's glasses. This act permanently deprived Mr. Jackson of the use of those glasses, within the definition of §15-3(b) of the Criminal Code, which defines "permanent deprivation" as "deprive the owner permanently of the beneficial use of the property." Ill.Rev.Stat. 1971, ch.38, par.15-3(b).

The defense contention that the required intent is not shown because the defendant did not physically touch the groceries or eyeglasses is without merit. The testimony of Mr. Jackson shows that Steve Bell acted together with the two other defendants in assaulting and taking the property of

Mr. Jackson. Steve Bell was a participant in and was, therefore, legally accountable for the actions of his co-defendants.

People v. Williams, 3 Ill.App.3d 1, 279 N.E.2d 100.

The defendant also argues that the terms of his probation were excessive and more severe than his co-defendants. The power to reduce sentences should be exercised with care and only when it is manifest from the record that the sentence is excessive. People v. Conway, 3 Ill.App.3d 69, 278 N.E.2d 852. The defendant was convicted of Criminal Damage to Property in violation of §16-1(a) of the Criminal Code, the penalty for which is \$500 fine or imprisonment in a penal institution other than the penitentiary not to exceed one year or both. Ill.Rev. Stat. 1971, ch.38, par.16-1(a). The terms of each of the defendants' probation are well within the statutory limitations and, considering the facts of the instant case, were reasonable and presented no great disparity.

The defense also argues that the assistant State's attorney improperly stated in aggravation that the defendant had "no convictions." The defense argues that this infers that the defendant had an arrest record. A fair reading of the comment does not bear out this contention.

For these reasons the judgment of the circuit court is affirmed.

Judgment affirmed.



9 T.A.³ 466
ABST.

56804

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	OF COOK COUNTY.
)	
v.)	
)	
DON JUAN WILLIAMS,	)	HONORABLE
	)	ARTHUR V. ZELEZINSKI,
Defendant-Appellant.)	)	PRESIDING.

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Defendant, Donald Williams, was charged with possession of a controlled substance (heroin) in violation of Section 402 of the Illinois Controlled Substances Act (Ill. Rev. Stat. 1971, ch. 56-1/2, par. 1402). After his motion to suppress evidence was denied, he was found guilty in a bench trial and sentenced to four months in the House of Correction. He appeals on the sole ground that there was a complete lack of evidence to prove that the substance involved was a controlled substance.

Police Officer Bertram Smith testified:

On September 29, 1971, he had a conversation with an informant who had stated that he had purchased two bags of "stuff" from a man named Don at or near 2050 West Madison in Chicago, describing defendant as to height and weight. This informant was known to the witness and had given him information at other times which had led to other arrests or convictions. The witness and his partner (Officer Gilmore) went to that address where he observed defendant and three other males standing in front of a vacant lot. He and his partner went around the block and the witness parked the squad car and came down and stood in the alley. A fifth man approached defendant and the three others. Defendant walked into the lot, stooped down, picked up a white box and picked something out of the box and handed something to the fifth man who walked away.

After the witness and his partner observed defendant pick

up the white box, they got back in the squad car, came around the block and stopped where defendant was standing on the street. The witness went into the lot, found the box using a flashlight, picked it up and took out a brown paper bag containing five tin foil packets; it was a white box with brown paper bag underneath. The item he picked up was the same item that he had seen in the hand of the defendant.

The record then shows the following questions and answers:

Q Did you have occasion to take that particular item to the crime lab?

A Yes, sir.

Q It was inventoried with the Chicago Police Department?

A Yes.

and the following questions and answers:

Q Did you have occasion to take that contraband to the crime lab and have the laboratory analyze it?

A Yes.

Q And did you receive a return dated 4 October 1971, Case No. 71-12700-C, wherein the crime lab chemist found that the five tin foil packets contained 1.3 grams, three of which were tested and found to be heroin?

A Yes, I did.

MR. DEROSE: That would be the State's case on the motion to suppress.

Will there be a stipulation, counsel, that the evidence adduced on the motion to suppress would also be adduced at the case on trial?

MR. SHERMAN: Certainly.

MR. DEROSE: Q The man you acquired the contraband, if you saw him again in court could you identify him?

A He is present in court, yes.

Q Please for the record indicate the man whom you saw that evening in question?

A The defendant there.

Defendant's attorney then requested and received the lab report.

Defendant testified that he never picked up any box in that vacant lot; that Officer Smith told defendant that he was going to "get" defendant because he did not like him; that he never had a white box or a brown bag under a white package. No one could have seen him pick up the box and lay it down again. He didn't do those things.

In cases involving the sale or possession of narcotics, positive identification is necessary to show that the suspected material is actually a proscribed narcotic or stimulant. People v. Resketo (1972), 3 Ill. App.3d 633, 635, 279 N.E.2d 432.

Defendant rests his appeal squarely on the Resketo case. In that case the arresting officer found a vial containing a white powder in the defendant's apartment. The vial containing the powder was "transported to the crime laboratory." The State's Attorney stated:

For the record it is case number, Robert Boise, Chicago Police Department Crime Laboratory chemist, case number, 69 10504-C; one plastic container containing .34 grams of white powder subjected to various chemical identity tests, determined to be amphetamines, a dangerous drug. All the foregoing happened in the City of Chicago, State of Illinois. This is the defendant you arrested?

The police officer then answered affirmatively that defendant was the person he arrested.

The court in that case found that there was a complete lack of proof that the substance found by the arresting officer was actually the same material which was subjected to chemical tests.

However, unlike the Resketo case, the evidence here is clear that the very same material found by the arresting officer was tested and found to be heroin. That in and of itself is more than sufficient proof that the substance involved was a controlled substance under the statute.

The police officer testified that after defendant had picked up a white box, taken something from it and handed it to another man, he (the officer) picked up the box and took out a brown paper bag containing five tin foil packets. This was the same item he had seen in the hand of the defendant. He also testified that the man from whom he acquired the contraband was the defendant.

He testified that he had occasion "to take that particular item to the crime lab" and that "it was inventoried with the Chicago Police Department." (Emphasis supplied.)

He also testified that he had occasion "to take that contraband to the crime lab and have the laboratory analyze it" and that he received "a return dated 4 October 1971, Case No. 71-12700-6, wherein the crime lab chemist found that the five tin foil packets contained 1.3 grams, three of which were tested and found to be heroin." (Emphasis supplied.)

Defendant's attorney was given the lab report at his request but never cross-examined the witness concerning it; nor did he object to it or make any motion regarding it. He was apparently satisfied of its validity. Any question as to the admissibility of this evidence was waived. People v. Lockett (1962), 24 Ill.2d 550, 554, 182 N.E.2d 696.

It appears to us that "Case No. 71-12700-6" mentioned in the report is the Police Department's numbering since the court number is 71 MC1 631130 which designates the year of filing as 1971, the district as Municipal Court First District, and the number of the case as 631130.

The proof is clear that the substance involved was a controlled substance under the statute (heroin).

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

Abstract only.

MAY 1 1971



56251

CARL G. and LOIS KLEHM,)	
)	
Plaintiffs-Appellees,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
vs.	)	COOK COUNTY.
)	
CHICAGO TITLE AND TRUST COMPANY, as)	
Trustee under Trust Agreement dated	)	HONORABLE
January 6, 1969 and known as Trust	)	DANIEL A. COVELLI,
#53105, et al.,	)	PRESIDING.
)	
Defendants-Appellants.)	

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

This is an appeal from an order granting the relief sought in a petition filed under Section 72 of the Civil Practice Act, vacating an order dismissing plaintiffs' complaint for want of prosecution. Ill.Rev.Stat. 1971, ch. 110, par. 72.

Plaintiffs filed suit on October 16, 1969, to foreclose a second mortgage. Defendants answered on December 19, 1969. On September 22, 1970, the case appeared on the chancery call. No one appeared for the plaintiffs and the case was dismissed for want of prosecution. On April 29, 1971, plaintiffs filed their Section 72 petition to vacate the dismissal order. Defendants did not respond to the petition.

The petition and plaintiffs' testimony established that plaintiffs were represented in the suit by Frederick A. Weber, as sole practitioner. In February, 1970, Weber became ill and was hospitalized in Indianapolis almost constantly between August and October, 1970. He was in the hospital there on September 22, 1970, the date of the dismissal order, and died three weeks later.

Between October, 1970, and April, 1971, the plaintiff Carl G. Klehm called at the office of defense counsel and discussed the case several times with two partners of the firm who repeatedly advised him to wait and the money would be forthcoming soon, the most recent of such conversations being on April 16, 1971. At

no time did either of the defense attorneys mention the dismissal. The plaintiffs then directed a new attorney to continue the suit. He immediately discovered the dismissal and the Section 72 petition was promptly filed seeking vacatur. The trial court granted the petition. The defendants appeal, contending that it was error for the court to grant plaintiffs' petition because plaintiffs failed to establish due diligence or excusable mistake.

A petition under Section 72 to vacate a dismissal of an action is always addressed to the equitable powers of the court and only where there is an abuse of discretion will a reviewing court interfere with that decision. Stackler v. Village of Skokie, 53 Ill.App.2d 417, 203 N.E.2d 183. In Ellman v. DeRuiter, 412 Ill. 285, 106 N.E.2d 350, the Supreme Court announced the broad rule applicable to a Section 72 petition, saying:

It is our belief that the motion may, under our present practice, be addressed to the equitable powers of the court, when the exercise of such powers is necessary to prevent injustice.

In the case at bar, the defendant argues that Weber's death did not improperly deny plaintiffs of counsel since Weber was obligated to have another attorney take over his practice and his failure to accomplish this is chargeable to plaintiffs. In Wright v. McGee, 131 Ill.App.2d 522, 264 N.E.2d 882, the plaintiff was represented by an attorney who died prior to trial. A default was entered when no one appeared to represent the defendant. We held that where a litigant is represented by a sole practitioner who dies, causing a default to be entered, the litigant is entitled to Section 72 relief because the death deprived the litigant of counsel and could not be considered a matter of inexcusable neglect. In the case at bar, the uncontradicted evidence demonstrated that Weber was a sole practitioner who was seriously ill and hospitalized in another state at the time plaintiffs' case was dismissed. The ill-health and death of Weber effectively deprived plaintiffs of counsel and was not a matter of inexcusable neglect.



Defendant also argues that since the plaintiffs knew of Weber's illness and death, their ensuing lack of counsel was the result of their own failure to act. Defendant overlooks the fact that plaintiffs did act through conferences with defense counsel as outlined above. In none of these conversations did they tell plaintiff that his suit had been dismissed, even though they surely knew that he was without counsel at the time or they would not have been discussing the case with him at all. Defendants contend that plaintiffs' petition does not allege that the particular two partners who conferred with him about the case had knowledge of the dismissal themselves, but they do concede that others in the firm who had been handling the case had known all about the dismissal. We deem this a surprising argument, and one unworthy of the firm which is unquestionably as fine a group of highly professional practitioners as any in the city. Nevertheless, we are forced to the conclusion that the conduct of the defense counsel who dealt with this plaintiff did not measure up to the fair dealing required by Ellman v. DeRuiter, 412 Ill. 285, 106 N.E.2d 350. See also George F. Mueller & Sons v. Morris, 128 Ill.App.2d 454, 263 N.E.2d 120.

Defendants rely strongly upon Esczuk v. Chicago Transit Authority, 39 Ill.2d 464, 236 N.E.2d 719, for the proposition that even though plaintiffs had no actual notice of the chancery call at which their case was dismissed for want of prosecution, they must be considered to have received binding constructive notice through publication of the calendar in the Chicago Law Bulletin. We believe that the Supreme Court did not contemplate application of this rule to a litigant who, to be sure, was represented of record by an attorney, but one who at the time lay dying in another state. Our conclusion in this regard is borne out, we think, by both Ellman v. DeRuiter, 412 Ill. 285, 106 N.E.2d 350, and Elfman v. Evanston Bus Company, 27 Ill.2d 609, 190 N.E.2d 348, in both of which cases there were active attorneys



of record when defaults were entered but the court invoked its equitable powers to set them aside because of circumstances which it found to require such results in the interest of justice and fairness.

We find no lack of diligence or inexcusable neglect on the part of plaintiffs, and the order of the trial court is therefore affirmed.

A F F I R M E D.

(Publish abstract only.)

ABST.



56705

TED MIERLAK,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	OF COOK COUNTY.
)	
v.)	
)	
VITO PIZZO, et al.,	)	HONORABLE
	)	SAMUEL SHAMBERG,
Defendants-Appellants.)	)	PRESIDING.

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

A judgment by confession was taken on May 24, 1971, by plaintiff against the defendants, upon a judgment note executed by defendants on February 2, 1971. An "Amended Petition to Vacate" the judgment was filed by defendants pursuant to Supreme Court Rule 276 alleging that the defendants had meritorious defenses to the action: those of no consideration for the note and of a material alteration on the face of the note. (Ill. Rev. Stat. 1971, ch. 110A, par. 276.) (Although designated as an "Amended Petition to Vacate," this court may treat the document as a motion to open the judgment filed pursuant to the Supreme Court Rule. National Boulevard Bank v. Corydon Travel Bureau, 95 Ill. App.2d 281, 285, 238 N.E.2d 81, 83.) An answer to the amended petition was filed by plaintiff, a hearing was had on the petition and the petition was denied. Defendants appeal.

The amended petition and the supporting affidavit filed therewith alleged and averred, inter alia, that no consideration was given for the note; that the note was allegedly given by defendants for services of plaintiff as a building contractor; that the services were never performed by him, nor did defendants ever enter into an agreement with him for the performance of those services; that the note was executed a substantial time after the restaurant building had been completed; that it was executed to keep peace between defendants, who were in partner-

ship in the restaurant, the defendant Pizzo being a good friend of plaintiff and subsequently withdrawing from the partnership; that defendants were diligent in presenting the petition to vacate; and that the note was void because the due date was stricken from the face thereof.

Plaintiff's answer to the petition recited that he was engaged by defendants to construct a restaurant building; that it was constructed and turned over to defendants who thereafter operated a restaurant therein; that defendants never repudiated their relationship with plaintiff during construction of the building; that a contractor's statement was executed by plaintiff and monies paid out on the construction, to defendants' knowledge; that defendants' execution of the note acknowledged their indebtedness to plaintiff; and that defendants state no defense in their petition.

Defendants contend that the court should have allowed their amended petition because it stated meritorious defenses to the action and further that it was not proper for the court to have considered plaintiff's answer to the petition in that it contested the merits of the defense rather than whether a defense existed or not.

Supreme Court Rule 276 provides means for opening a judgment taken by confession and recites that if the motion to open the judgment and its supporting affidavit disclose a prima facie defense on the merits of the case, the court shall set the motion for hearing; if, upon the hearing, it appears that a defense on the merits exists and that defendant has been diligent in presenting the motion to open, the court shall sustain the motion. (Ill. Rev. Stat. 1971, ch. 110A, par. 276.)

The scope of the hearing on the motion and supporting affidavit, the averments in which are taken as true, is to determine

whether a meritorious defense exists and such determination must be made solely from the motion and affidavits. National Boulevard Bank v. Corydon Travel Bureau, 95 Ill. App.2d 281, 238 N.E.2d 81. It is improper to consider the merits of the defense set out in determining whether a defense exists. Barrick v. Barnes, 46 Ill. App.2d 172, 196 N.E.2d 526.

Without considering the alleged defense of material alteration of the note, it is clear that defendants' petition and affidavit made out a meritorious defense of no consideration. The trial court improperly considered the merits of the defense which is implicit in the denial of the petition since it alleges facts which state a defense and not conclusions. The petition should have been allowed.

For these reasons the order of the trial court is reversed and the cause is remanded with directions to open the judgment by confession and for further proceedings not inconsistent with this opinion.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Abstract only.

MAY 1 1973

57145

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Respondent-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY.
vs.)	
)	
WALTER JORDAN,	)	HONORABLE
	)	WILLIAM S. WHITE,
Petitioner-Appellant.	)	PRESIDING.

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Defendant filed a pro se post-conviction petition under the provisions of the Post-Conviction Hearing Act (Ill.Rev. Stat. 1971, ch. 38, pars. 122-1 et seq.), asking the court to vacate the judgment entered on a jury verdict of guilty of rape.

The petition was filed with the Clerk of the Circuit Court on December 23, 1963, while petitioner's direct appeal was pending in this court. The judgment was affirmed in People v. Jordan, 121 Ill.App.2d 388, 257 N.E.2d 536. The Supreme Court denied defendant's petition for leave to appeal (44 Ill.2d 585).

The petitioner contended that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States and the State of Illinois. The state's attorney filed a motion to dismiss the post-conviction petition, which was sustained on May 14, 1970, without an evidentiary hearing, and the petitioner appealed to the Illinois Supreme Court, which transferred the cause to this court.

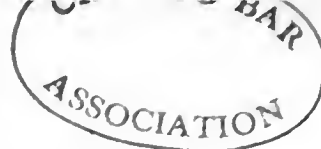
The sole contention on appeal was whether the petitioner was entitled to post-conviction relief because of the State's refusal to give the petitioner a police report purporting to contain a pretrial statement of the rape victim. There was

no proof that such a statement actually existed. However, this issue was raised by the petitioner on his direct appeal (People v. Jordan, 121 Ill.App.2d 388, 257 N.E.2d 536). It has been consistently held that a judgment of this court is res judicata as to all issues which had been raised on a direct appeal. People v. Adams, 52 Ill.2d 224, 287 N.E.2d 695; People v. Johnson, 47 Ill.2d 568, 268 N.E.2d 1; People v. Derengowski, 44 Ill.2d 476, 256 N.E.2d 455; People v. Jones, 5 Ill.App.3d 951, 284 N.E.2d 418.

The judgment of the trial court is affirmed.

A F F I R M E D.

(Publish abstract only.)



MAY 1 1973

57208

FIRST COMMERCIAL BANK, CHICAGO,	)	APPEAL FROM
ILLINOIS, AS TRUSTEE UNDER TRUST	)	CIRCUIT COURT
NO. 1111, L. SHELDON BROWN, Agent	)	OF COOK COUNTY.
and Beneficiary,)	
)	
Plaintiff-Appellee,)	
)	
v.)	
)	
POINT OF VIEW, INC., an Illinois)	
Corporation,	)	HONORABLE
	)	PAUL A. O'MALLEY,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Defendant, Point of View, Inc., appeals from an order denying its motion to vacate a judgment by confession entered upon a written lease between the parties which, by its terms, had expired.

No appearance or brief was filed by plaintiff in this court.

On July 15, 1971, judgment was confessed against Point of View, Inc., for \$1,155 rent plus cost of eviction in Case No. 714 M 923 in the amount of \$22 and \$148 attorney's fees for a total of \$1,325 pursuant to a complaint which stated in part:

1. On June 4, 1964, a written lease was made between Warren V. Black, as landlord, and defendant, Point of View, Inc., an Illinois corporation; the lease was subsequently assigned to plaintiff.
3. Defendant did not pay rent due as a holdover tenant from June 1, 1971, to July 15, 1971.

The lease read in part:

FIFTEENTH: -- If default be made in the payment of the rent * * * or any installment * * *, Lessee does hereby irrevocably constitute any attorney of any court of record in this State, attorney for him and in his name, from time to time, to waive the issuance of process and service thereof, to waive trial by jury, to confess judgment in favor of lessor, * * * and against lessee, for the amount of rent which may be then due, by virtue of the terms hereof, or of any extensions or renewals hereof, or by virtue of any holdover after the termination hereof and which may be in default, as aforesaid, together with the costs of such proceedings, and a reasonable sum * * * for plaintiff's attorney's fees * * *.

On November 9, 1971, defendant moved to vacate the judgment on the ground that the defendant had a meritorious defense in that the court had no power to confess judgment for rent accruing after the term of the lease, that the complaint admitted defendant was a holdover tenant thus raising a question of fact about the terms of the renewal, that a judgment for confession cannot concern "a fact that can be established by testimony outside the written documents" and that defendant's possession was pursuant to an oral agreement under which \$580 was the agreed rent for the holdover period. Plaintiff filed a counter-affidavit that defendant "wrongfully refused to vacate the premises," did move out on July 10, 1971, but that it cost \$450 "to replace the damage unnecessarily committed" by the defendant. The trial court, after examining the affidavits, denied the motion to vacate.

A power to confess judgment for rent accruing during the term of a written lease does not authorize a confession of judgment for rent accruing after the term of the lease. Weiss v. Danilozik (1931), 262 Ill. App. 551. Hymen v. Anschicks (1933), 270 Ill. App. 202, 204. "[W]here a lease has expired by its terms, the character of the subsequent tenancy, if any, raises a question of fact, and * * * the power to confess judgment is not a power to confess such a fact but only to confess such facts as appear from the lease"; the character of the subsequent tenancy is "a question of fact to be established by testimony outside the written documents"; Cutler v. Leader Cleaners, Inc. (1957), 12 Ill. App.2d 439, 446, 139 N.E.2d 832.

In the case of Fortune v. Bartolomei (1896), 164 Ill. 51, 45 N.E. 274, the Supreme Court upheld a judgment by confession for past due rent based on the amount of monthly rentals set forth in the lease but stated that any amount accruing under other provisions of the lease was an uncertain and unliquidated amount of

money and held the power to confess judgment for that amount was void. The reasoning of the court in Fortune v. Bartolonei applies to the case at bar since the July 15 judgment, on its face, contains elements that are not ascertainable from the provisions of the lease. Judgment was entered for \$1,155 in rent, but the rental recited in the lease was \$385, and the period for which rent was claimed in the complaint was a month and a half.

The holding over by a tenant following the expiration of his lease does not necessarily extend the lease; "The landlord exercises the exclusive right either to treat him as a holdover tenant and permit the terms of the original lease to be again in effect or to consider him a trespasser" and what circumstances indicate whether the landlord has exercised an intention to treat the tenant as a holdover is question of fact; Sheraton-Chicago Corp. v. Lewis (General No. 56070, First Dist., Third Div., November 2, 1972); slip opinion, page 2. Moreover, the holdover tenancy implied by law is not conclusive "but is rebuttable by proof that the tenant holds over under a new agreement with the landlord, even though such agreement is unenforceable and void under the Statute of Frauds"; Norville v. Dambacher (1962), 35 Ill. App.2d 212, 182 N.E.2d 337.

The judgment is reversed.

JUDGMENT REVERSED.

Abstract only.

57588

HELEN URBANIAK,)	
)	
Plaintiff-Appellee,)	
)	
vs.	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
JOHN BERG MANUFACTURING COMPANY,	)	COOK COUNTY.
a Corporation, et al.,)	
)	
Defendants)	
)	
JOHN BERG MANUFACTURING COMPANY,	)	HONORABLE
a Corporation,	)	NICHOLAS J. BUA,
	)	PRESIDING.
Appellant.)	

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

This is an appeal permitted by us under Illinois Supreme Court Rule 308 (Ill.Rev.Stat. 1971, ch. 110A, par. 308) from an order of the trial court which denied the motion of John Berg Manufacturing Company, a Corporation, defendant-appellant, for summary judgment. The motion for summary judgment was based on the defendant's contention that the cause of action was barred by Section 14 of the Limitations Act (Ill.Rev.Stat. 1971, ch. 83, par. 15).

On April 17, 1972, the plaintiff filed her complaint for personal injuries resulting from an accident that occurred on April 15, 1970. The defendant filed a motion for summary judgment, contending that the complaint was filed two days after the expiration of the two-year limitation period for personal injuries as set forth in Section 14 of the Limitations Act (Ill. Rev.Stat. 1971, ch. 83, par. 15).

Defendant contends that the basic issue is whether the Clerk of the Circuit Court of Cook County was required by law to keep his office open on Saturday, April 15, 1972, thus enabling plaintiff to have filed her suit on that day.

Contrary to this contention, it is our opinion that the controlling issue is not whether the Circuit Court Clerk's office was or was not open on April 15, 1972, but, rather,



whether the time for the plaintiff to file her complaint was extended to April 17, 1972, under the provisions of Section 1.11 of the Construction of Statutes Act (Ill.Rev.Stat. 1971, ch. 131, par. 1.11) when read in conjunction with Section 14 of the Limitations Act (Ill.Rev.Stat. 1971, ch. 83, par. 15).

Effective July 1, 1969, Section 1.11 of the Construction of Statutes Act was amended by adding Saturday to the days to be excluded in computing time. Thus, on the dates pertinent to this case, that section read:

The time within which any act provided by law is to be done shall be computed by excluding the first day and including the last, unless the last day is Saturday or Sunday or is a holiday as defined or fixed in any statute now or hereafter in force in this State, and then it shall also be excluded. If the date succeeding such Saturday, Sunday or holiday is also a holiday or a Saturday or a Sunday then such succeeding day shall also be excluded. (Emphasis added.)

Defendant argues correctly that it is necessary to ascertain the intent and meaning of the statute. We find such intent and meaning clear and ascertainable from the language of the statute itself. If Saturday is the last day, then that Saturday, as well as the following Sunday (or a holiday), shall be excluded in computing "the time within which an act provided by law is to be done." The various statutes are to be considered in pari materia and must not be construed to conflict if they can reasonably be read as implementing each other. That, we think, can and should be done in this case.

Reading the two pertinent statutes together, they provide that personal injury actions shall be commenced within two years next after the cause of action occurred, except that if the last day is a Saturday or Sunday or a holiday, then that day (or those days), shall be excluded in computing the time within which the act shall be done. Applying this interpretation to the facts in the case at bar, plaintiff had until April 17, 1972, within which to file her complaint for personal injuries, regardless

of whether or not it might have been possible to file suit
 in the Clerk's Office on April 15, 1972. ^{*} See John Allan Co. v.
Sesser Concrete Products Co., 114 Ill.App.2d 186, 252 N.E.2d 361.

The order of the trial court is affirmed and the cause is
 remanded for further proceedings not inconsistent with this
 opinion.

AFFIRMED AND REMANDED.

(Publish abstract only.)

* In his Appellant's Brief reliance is placed upon a statute which requires the County Clerk to keep his office open for business on Saturdays during certain hours. Ill.Rev.Stat. 1971, ch. 35, par. 4(a). Since the County Clerk is not the same as the Clerk of the Circuit Court, this argument is manifestly misplaced. In his Reply Brief, defendant cites another statute considerably closer to home, but still not controlling. It provides that Clerks of the Circuit Court shall keep their offices open on "such days as he may be ordered by the rule of the court ***." Ill.Rev.Stat. 1971, ch. 25, par. 4. He then refers us to a General Order of the Chief Judge of the Circuit Court of Cook County directing the Clerk of that court for the County Department to keep his office open during certain hours on Saturdays. An order of a Chief Judge is not encompassed by the statutory designation of a rule of court, the existence of which is not here claimed.

56644

HELEN DANIELS,)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY.
vs.)	
)	
JOHN DANIELS,	)	HONORABLE
	)	JAMES H. FELT,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Helen Daniels and John Daniels were married on October 7, 1965, and lived together until May 15, 1967. Thereafter, Helen Daniels filed suit seeking a divorce from her husband on the grounds of physical cruelty. After a hearing before the court without a jury, the trial judge found in favor of plaintiff and a decree was entered granting plaintiff a divorce from which defendant appeals.

Defendant contends that plaintiff failed to prove by a preponderance of the evidence that he committed two separate acts of cruelty because the first alleged act was provoked and was not willfully and intentionally performed; because the acts of physical cruelty were slight and do not qualify as extreme cruelty; and because the testimony of the plaintiff was uncorroborated, since the two other witnesses who testified were not worthy of belief.

Helen Daniels testified that on February 15, 1967, she was in the kitchen of her home holding her young child, Denise, who was crying. The defendant had been drinking heavily and attempted to take the child. Mrs. Daniels objected because of the defendant's condition. Without provocation by her, defendant struck her in the face and knocked her to the floor crying. She received medical treatment for her injuries. She also testified that on May 15, 1967, the defendant was again drinking and slapped her face, causing it to discolor.

John Palmer, plaintiff's son by her first marriage, testified that on February 15, 1967, he observed his mother pushed against the washing machine by the defendant. He drove his mother to the hospital for treatment of her injuries. He did not remember if Denise was present at the time of the incident.

Sandra Davis, plaintiff's daughter by her first marriage, testified that on May 15, 1967, she heard her mother and defendant arguing. Then she heard her mother scream and, as she entered the kitchen, observed her mother on the floor crying. Her mother said that the defendant had struck her. She also testified that on February 15, 1967, she had entered the family kitchen and observed her mother on the floor. Her mother said that defendant had struck her. At the time of the February 15, 1967 incident, Mrs. Davis did not remember where John Palmer was and did not see Denise.

Defendant testified that he never hit or physically abused his wife in any way. He denied that either incident testified to by plaintiff and her witnesses had ever occurred.

Defendant argues that the February 15, 1967 incident was provoked by plaintiff and was not willfully and intentionally performed; that he was merely attempting to care for his crying child when Mrs. Daniels resisted his effort.

It is within the province of the trial court, as finder of the facts, to make the determination of whether there has been sufficient evidence to establish either party's contentions. This court will not set aside the trial court's findings unless the decision reached is against the manifest weight of the evidence. Hoffman v. Hoffman, 40 Ill.2d 344, 239 N.E.2d 792. In this case, the testimony of Mrs. Daniels, if believed, established that both the February 15 and May 15, 1967 incidents were performed by defendant intentionally, willfully and without provocation.

The defendant argues that the acts of physical cruelty were slight and do not qualify as extreme cruelty. In Kovack v. Kovack, 131 Ill.App.2d 382, 268 N.E.2d 258, we set forth what is necessary to establish physical cruelty:

Two acts of physical violence, resulting in pain and bodily harm, committed on separate occasions, are sufficient grounds for divorce.

There we held sufficient the plaintiff's testimony that she had been struck by her husband, causing marks on her arm and leg.

In the case at bar, the testimony of plaintiff and her children showed that she had twice been the victim of physical violence resulting in pain and bodily harm. If believed, as it was by the trial court, this was sufficient to establish the statutory grounds for divorce.

The defendant lastly argues that the testimony of Mrs. Daniels was uncorroborated because the conflicts in the testimony of John Palmer and Sandra Davis made their testimony unworthy of belief. Although there may be some conflict or inconsistency in the testimony, it was basically sufficient evidence, if believed, to establish that the defendant was guilty of two separate and unprovoked acts of extreme and repeated cruelty, causing pain and bodily harm. Since the trial judge observed the witnesses and heard them testify, it was his function to determine their credibility. Tuyls v. Tuyls, 21 Ill.2d 192, 171 N.E.2d 779.

The judgment is affirmed.

A F F I R M E D.

(Publish abstract only.)

9 I.A.³ 623

71-397

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice

Honorable THOMAS J. MORAN, Justice

Honorable GLENN K. SEIDENFELD, Justice

HOWARD K. KELLETT, Clerk

JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On
January 30, 1973 the Opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, viz:

JAN 20 1973

Appellate Court, 2nd District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.) Appeal from the Circuit
) Court of the 17th Judi-
) cial Circuit, Winnebago
JOHN CLAYTON KELLY GASTON,) County, Illinois.
)
Defendant-Appellant.)

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

John Clayton Kelly Gaston appeals the denial of his petition for post-conviction relief from his conviction of armed robbery, after an evidentiary hearing. He claims he was denied effective assistance of counsel in the post-conviction proceedings. Also that the denial of his motion to reopen the proof to show that his original arrest was illegal (and the conviction, based upon the arrest therefore invalid), deprived him of the opportunity to raise a meaningful constitutional issue with regard to his conviction.

Petitioner, 38 years old, with an education including two years of college, and, from the record, obviously very intelligent, insisted upon representing himself. When the court clearly stated that in his view this was a mistake and that petitioner should allow a trained lawyer to question witnesses and present evidence, petitioner politely disagreed. He told the court that he thought the public defender was "an able attorney", and yet he felt "more about this case and its more intimate details",

than the defender. The court nevertheless appointed the defender to assist the petitioner, although acceding to Gaston's request that he would retain full control over and be responsible for his own representation in the proceedings. On a number of occasions petitioner, although permitted broad range in his questioning by the court, encountered phrasing problems. The defender would inquire until the particular area of questioning was completed. Then petitioner would resume, often very skillfully. The whole record does not support the claim of ineffective representation in the evidentiary hearing, limited as appointed counsel was by the restrictions which defendant imposed upon him. People v. Richardson (1959), 17 Ill.2d 253, 260-261.

Defendant more particularly complains that appointed counsel did nothing to aid defendant in the more than eight and one-half months which intervened between his appointment and the post-conviction hearing. The defendant himself filed an amended pro se petition but now argues that counsel should have examined the transcript of proceedings (with no showing on the record that he did) and should have amended the pro se petition to adequately state the defendant's constitutional claims. He claims that these failures amounted to ineffective representation within the terms of People v. Slaughter (1968), 39 Ill.2d 278 and cases which have followed. (People v. Garrison (1969), 43 Ill.2d 121; People v. Hawkins (1970), 44 Ill.2d 296.) The fact that defendant filed a coherent petition, waived his right to counsel, and received a full evidentiary hearing, distinguishes the cases.

The record shows that appointed counsel communicated with the defendant by mail, stating that he had reviewed the defendant's pro se petition carefully, filed motions for issuance of subpoenas to witnesses and for production of police reports, and appeared in court with the defendant. The failure of the defender to include

in the record a certificate declaring these efforts does not prove lack of compliance with Supreme Court Rule 651(c)(Ill.Rev.Stat. 1971, ch.110A, sec.651(c)) since the record clearly shows substantial compliance with the rule. See People v. Williams (1972), 5 Ill.App.3d 56, 58-59.

The denial of petitioner's request to reopen his case at the close of the post-conviction evidentiary hearing, presents no substantial constitutional question. Petitioner sought to recall the police officer who investigated his arrest in an effort to establish that the arrest was without probable cause, presumably because the complaining witness allegedly had not identified the defendant prior to the arrest. No new evidence was offered but merely unsubstantiated conclusions that the result of the further examination of the officer would disclose no probable cause for the initial arrest. The record of the post-conviction hearing discloses the officer's report which included substantial identification details furnished by the complaining witness prior to the arrest. And following the arrest the complaining witness positively identified the defendant. The arrest was pursuant to a warrant issued by a judicial officer who found probable cause for the arrest. The allegations presented no substantial constitutional question. People v. Goerger (1972), 52 Ill.2d 403, 408. See also McCray v. Illinois (1967), 18 L.Ed.2d 62, 68.

Further, the defendant was represented at his armed robbery trial by counsel of his own choice and no objection was made to the constitutionality of the arrest, nor was a motion made to suppress the identification. This constitutes an effective waiver of the claim made here. People v. Goerger (1972), 52 Ill.2d 403, 405; People v. Mamolella (1969), 42 Ill.2d 69, 72; People v. French (1965), 33 Ill.2d 146, 149.

We conclude that the petitioner was afforded a full, fair, and impartial post-conviction hearing, free from prejudicial error. We therefore affirm.

Affirmed.

GUILD, P.J. and THOMAS J. MORAN, J. concur.

72-33

STATE OF ILLINOIS

PEOPLE VS. FRANCIS E. GOETZ



APPPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,
on the 1st Day of January in the Year of our Lord one thousand
nine hundred and seventy-three, within and for the Third District
of Illinois:

Present—+PC

HONORABLE JAY J. ALLOY, Presiding Justice

HONORABLE ALBERT SCOTT, Justice

HONORABLE ALLAN L. STODER, Justice

HONORABLE WALTER DIXON, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on
February 9, 1973 _____ the Opinion of the
Court was filed in the Clerk's Office of said Court, in the words
and figures following, viz:

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1973.

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Fulton County.
)	_____
v.)	
	)	Honorable
FRANCIS E. GOETZ,	)	Francis P. Murphy
	)	Presiding Judge.
Defendant-Appellant.)	

PER CURIAM

Abstract

Defendant Francis E. Goetz appeals from a conviction for forgery and a consequent sentence of 2 to 5 years in the Illinois State Penitentiary. He contends on appeal that there was error in the trial court in failure to quash a search warrant and suppress evidence; error in repeated introduction of evidence of other crimes; error in the admission in evidence of a check marked "suspect forgery"; and, also, error in sentencing to an excessive sentence. Defendant asserts that trial errors justify remandment of this cause for a new trial.

This court, following extensive delay by reason of the failure of the prosecutor to file a brief in this cause, advised the prosecutor that unless a brief was filed by the prosecutor in this cause, the case would be subject to reversal. No brief was filed in this case in response thereto. We could consider this as a tacit admission of at least some trial court error which would justify remandment of this case. A motion for summary reversal was also filed on behalf of the defendant following

the failure of the prosecutor to file a brief in accordance with the required procedure on appeal.

By reason of the foregoing procedure and the nature of the case, we deemed it expedient to examine the record in this cause. As a result, we have determined that reversal and remandment of this case is required. One notable basis for remandment arises by reason of the fact that in the course of the trial, a check alleged to be forged was submitted as evidence for consideration by the jury. The words "suspect forgery" were written on the check although it was indicated that those words were not on the check at the time the check was used by the alleged forger. No attempt was made to explain the presence of the notations to the jury nor was any warning given to the jury to disregard the notations despite defendant's counsel's objection to the introduction of the check. The prosecuting attorney admitted during the course of the trial that the words were "inflammatory" and suggested that they be blocked out before the document was submitted to the jury. This was not done. This erroneous procedure alone would justify reversal of this cause and remandment for new trial. (People v. Vammer, 320 Ill. 287, 150 N.E. 2d 628.) In view of the circumstances of this case, it is not necessary that we discuss any of the other issues involved.

The judgment and consequent sentence of the circuit court of Fulton County in this cause as to defendant Francis E. Goetz is reversed and this cause is remanded to the circuit court of Fulton County for new trial and such further proceedings as may be required.

Reversed and Remanded.

9 I.A.³ 696

71-335

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice

Honorable THOMAS J. MORAN, Justice

Honorable MEL ABRAHAMSON, Justice

HOWARD K. KELLETT, Clerk

JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

February 7, 1973 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

FILED
HOWARD A. KELLEY, Clerk
Appellate Court, 2nd District
Abstract

No. 71-335

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the Circuit
	)	Court for the 16th Judicial
FRANK WALLS,	)	Circuit, Kane County,
	)	Illinois.
Defendant- Appellant.)	

MR. JUSTICE ABRAHAMSON delivered the opinion of the court:

Defendant appealed to the Illinois Supreme Court from a judgment of the circuit court of Kane County which granted the State's motion to dismiss his post-conviction petition without an evidentiary hearing. After examining the record and the briefs the Supreme Court transferred the case to this court.

In May of 1967 defendant was found guilty after a bench trial of aggravated battery of his wife and the murder of Willie Duncan on November 12, 1966, and was sentenced to a term of 14 to 24 years in the penitentiary.

In June, 1970, defendant filed his petition for relief under the Post-Conviction Hearing Act (Ill. Rev. Stat. 1969, ch. 38, pars. 122-1, et seq.) alleging in substance that his constitutional rights were violated when he gave his written confession (within an hour of the shooting) because he was not then advised that he might be charged with murder; and because of anxiety, loss of sleep, and intoxication, the confession was not voluntary.

The petition was accompanied by affidavits of his brother and sister, each of which was to the effect that they saw the defendant at the police station about 9 a. m. on November 12, 1966, (2 1/2 hours after defendant confessed) and detected a strong odor of alcohol about him, that he was then intoxicated and that for some time prior thereto he was "depressed and not mentally responsible."

At his trial defendant was represented by retained counsel. A motion to suppress the confession was filed and a hearing had thereon. The defendant testified at the hearing on the motion but neither his brother or sister testified and no evidence was offered that he was intoxicated at the time of making the confession. The motion to suppress was denied. He had ample opportunity to present any available evidence of the matters set forth in his petition, but did not do so. The affidavits were mere unsupported conclusions of defendant's brother and sister, given four years after the trial, as to defendant's intoxication and mental state on or about the date of his confession and without any supporting facts.

In People v. Arbuckle, 42 Ill. 2d 177, 179, the Illinois Supreme Court stated:

"The cases repeatedly state that an evidentiary hearing under the Act should be granted only if defendant's post-conviction petition makes a 'substantial showing of a violation of constitutional rights, and allegations which merely amount to conclusions are not sufficient to require a post-conviction hearing.' People v. Knight, 38 Ill. 2d 373 . . ."

Defendant was fully advised of his constitutional rights before he gave his confession. At that time one of his victims had not yet died. Defendant urges this court to rule that the admission of his confession, in the absence of advice that if his victim died defendant may be charged with murder, was a denial of defendant's constitutional rights. We reject that argument. Townsend v. Sain, 372 U.S. 293, cited by defendant,

would not support such holding by any stretch of the imagination. . That case involved injection by the police of a drug comparable to a truth serum in procuring a confession. That is a far cry from the instant case where the defendant immediately after the shooting went directly to the police station and confessed his act without any action whatever by the police.

In our opinion the trial court was justified in dismissing defendant's post-conviction petition. The judgment is therefore affirmed. Judgment affirmed.

GUILD, P. J. and THOMAS J. MORAN, J. , concur.

71-350

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice

Honorable THOMAS J. MORAN, Justice

Honorable GLENN K. SEIDENFELD, Justice

HOWARD K. KELLETT, Clerk

JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

FEB 15 1973

the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

Abstract

MARGARET NUGENT,)	
)	
Plaintiff and)	
Counter-defendant,)	
Appellee,	)	Appeal from the Circuit
	)	Court of the 18th Judi-
v.	)	cial, DuPage County,
	)	Illinois.
DONALD J. NUGENT,)	
)	
Defendant and)	
Counter-plaintiff,)	
Appellant.)	

MR. JUSTICE SEIDENFELD delivered the opinion of the court:

Plaintiff, Margaret Nugent, and the defendant, Donald J. Nugent, were married on February 7, 1948, and on November 24, 1970, the plaintiff filed suit for divorce on the grounds of mental and physical cruelty. The defendant filed a counter-claim seeking divorce on the ground of mental cruelty toward the counter-plaintiff and the children of the parties. The trial court found the issues in favor of plaintiff and granted her a divorce. Defendant appeals from this judgment and from a denial of his counter-claim as well as from orders awarding custody of Donald, age 12, to plaintiff (custody of Timothy, age 20 and Mark, age 17 was awarded to the defendant); granting plaintiff \$10 per week alimony; awarding plaintiff certain property in Michigan; awarding plaintiff certain household furnishings in the marital home; granting plaintiff \$1,500

attorney's fees; and ordering that the marital home be sold and the proceeds divided equally.

Défendant urges that the granting of the divorce to the plaintiff was against the manifest weight of the evidence and that instead the evidence justifies the awarding of a divorce and the custody of Donald, the minor child, to the defendant and counter-plaintiff. He also argues that the court entered the decree without notice to him and thereby deprived him of a hearing in which he could have objected to various provisions of the decree.

Without stating the extensive evidence adduced at the contested trial, we conclude from a review of the conflicting testimony that the granting of the divorce to the plaintiff was not against the manifest weight of the evidence. Plaintiff testified that during their altercations defendant struck her on more than one occasion, threatened to kill her, called her insane in front of the children, and stated that he would not rest until she was put in an asylum. She testified to the effect this had on her health and to the fact that she had consulted with a psychiatrist over a period of many months and had required various medications. Defendant in his testimony blamed the downfall of their marriage on the fact that in 1965 plaintiff began taking amphetamines in connection with a weight reducing program. He stated that she became more irritable, progressed to other drugs, and also drank intoxicating liquors in large amounts. He testified that plaintiff often went into wild rages, and he denied ever threatening or striking her, stating that he only resisted her attempts to strike him. Other witnesses were either not aware of any cruelty on the part of either party or said that plaintiff instigated the altercations. However, it was within the province of the trial court, which heard the evidence and viewed the witnesses, to resolve the conflicting testimony in favor of the plaintiff. We

attorney's fees; and ordering that the marital home be sold and the proceeds divided equally.

Défendant urges that the granting of the divorce to the plaintiff was against the manifest weight of the evidence and that instead the evidence justifies the awarding of a divorce and the custody of Donald, the minor child, to the defendant and counter-plaintiff. He also argues that the court entered the decree without notice to him and thereby deprived him of a hearing in which he could have objected to various provisions of the decree.

Without stating the extensive evidence adduced at the contested trial, we conclude from a review of the conflicting testimony that the granting of the divorce to the plaintiff was not against the manifest weight of the evidence. Plaintiff testified that during their altercations defendant struck her on more than one occasion, threatened to kill her, called her insane in front of the children, and stated that he would not rest until she was put in an asylum. She testified to the effect this had on her health and to the fact that she had consulted with a psychiatrist over a period of many months and had required various medications. Defendant in his testimony blamed the downfall of their marriage on the fact that in 1965 plaintiff began taking amphetamines in connection with a weight reducing program. He stated that she became more irritable, progressed to other drugs, and also drank intoxicating liquors in large amounts. He testified that plaintiff often went into wild rages, and he denied ever threatening or striking her, stating that he only resisted her attempts to strike him. Other witnesses were either not aware of any cruelty on the part of either party or said that plaintiff instigated the altercations. However, it was within the province of the trial court, which heard the evidence and viewed the witnesses, to resolve the conflicting testimony in favor of the plaintiff. We

will not disturb the court's determination on this record. See Hayes v. Hayes (1969), 117 Ill.App.2d 211, 215.

Defendant's argument that he failed to produce evidence as to any matters regarding financial considerations of the case because the court led him to believe that it would first decide the issue of divorce and then hold a hearing as to property rights is not supported by the record. The plaintiff's attorney called (Ill.Rev.Stat. 1969, ch. 110, par. 60) the defendant under Section 60/and questioned him as to his financial situation. While defendant objected on the basis that the case in chief should go in first before they reached the financial issue, his objection was overruled. The court at no time said it would hold a separate hearing to determine property rights at a later date.

Due to the state of the record, it is difficult to reach defendant's further contention that he was deprived of an opportunity to object to items in the decree because he was not notified that a decree was being entered. It appeared from statements of counsel at the post-trial hearing that defendant was served with a copy of a proposed decree of divorce and three times was served with notice of hearing on the proposed decree. The first two times defendant failed to appear and the court agreed to postpone the hearing on the basis that his counsel had business in Springfield. On the third time defendant did appear and objected to certain portions of the decree. The court ordered the plaintiff to change the decree and it appears that defendant did not receive notice of the presentment and entering of the revised decree. Plaintiff alleges that the only change ordered and made was to provide that the marital home, which was to be sold, had a second mortgage on it held by the defendant's parents in the sum of \$12,500. Defendant states that several provisions of the final decree were not as ordered by the court and that the original decree did not provide for the sale of the house. Defendant's counsel voiced his

objections to the revised decree at the hearing on his post-trial motion. In view of the trial court's denial of the motion and in the absence of proof in the record that the final decree was changed in a manner not ordered by the court when defendant appeared and objected, we conclude that the failure to notify the defendant of the entry of the modified decree was not prejudicial error. Cases cited by the defendant (Bradshaw v. Bradshaw (1966), 69 Ill.App.2d 91, 94; McKeon v. McKeon (1955), 4 Ill.App.2d 515, 524-525) are inapposite because in those cases the party did not receive any notice of the entry of a decree and had no knowledge of the contents of the decree.

Defendant contends that the court erroneously awarded the custody of the minor son, Donald, to the mother. There was testimony that both parties would be fit and proper to have custody of the child. The evidence showed that plaintiff was employed as a children's librarian for some five years as of the date of trial. Under all the circumstances, and giving primary concern to the best interests of the child, the award of Donald's custody to his mother was not against the manifest weight of the evidence.

Simonson v. Simonson (1970), 128 Ill.App.2d 39, 47.

Defendant argues that the plaintiff is not entitled to \$10 a week alimony. The evidence introduced during the course of the trial established that defendant earns about \$18,000 per year and that he pays \$175.04 per month on the first of two mortgages on the house; that he received a \$1,000 bonus in 1969 but no bonus in 1970; that plaintiff earns \$8,208 per year as a librarian and at the time of trial was renting a five room house for \$290 per month. There was also testimony as to monthly expenses of the plaintiff in the amount of \$1120.90. The award was not against the manifest weight of the evidence. Hoffmann v. Hoffmann (1968), 40 Ill.2d 344, 349.

Defendant next contends that there was insufficient justification for the award of \$1500 attorney's fees since no hearing was held and no evidence was taken as to the reasonableness of the amount awarded. The allowance of attorney's fees in a divorce proceeding rests in the sound discretion of the trial court.

(Canady v. Canady (1964), 30 Ill.2d 440, 446.) Here, the court was aware of the respective means of the parties and their abilities to pay attorney's fees. While no evidence was taken as to the services rendered by plaintiff's attorney, or as to the reasonable value of those services, in the absence of a request for a hearing, the court may grant fees in an amount based on the financial circumstances of the parties, the apparent services of counsel shown in the record, and the court's own experience.

(Johnston v. Johnston (1971), 130 Ill.App.2d 1042, 1046; Jones v. Jones (1964), 48 Ill.App.2d 232, 239-240; Kijowski v. Kijowski (1962), 36 Ill.App.2d 94, 100-101.) The record does not show a request for a hearing on attorney's fees and we find no abuse of the court's discretion in fixing the fees.

Defendant also complains that the court erred in awarding the "Michigan property" to the plaintiff. It appeared that the property was solely in the plaintiff's name. Defendant's testimony that he paid the original \$500 for the property and assumed that the title had been drawn up in joint tenancy but that she might have done otherwise, was insufficient to show special equities in the property. (Ill.Rev.Stat. 1969, ch.40, par.18.) Where a wife is given title to property purchased in whole or in part from the husband's funds there is presumption of a gift from the husband to the wife and the circumstance that the husband paid the purchase price does not, in the absence of fraud or coercion, make him the equitable owner of the interest. (Peck v. Peck (1959), 16 Ill.2d 268, 283; Barbara v. Barbara (1969), 110 Ill.

App.2d 189, 194-195.) Defendant's proof fails to overcome by clear and convincing evidence the presumption of a gift. Stevens v. Stevens (1958), 14 Ill.2d 99, 109.

We agree with defendant's final contention that the court erred in ordering that the marital home, held in joint tenancy, be sold with each party to share equally in the proceeds. The court had only such jurisdiction to hear and determine divorce matters as conferred by statute. (Schouten v. Schouten (1970); 129 Ill.App.2d 418, 421.) We find no basis for the court's order of sale of the jointly held property here. Section 20 of the Divorce Act (Ill.Rev.Stat. 1969, ch.40,par.21.) is inapplicable as it authorizes a sale only to enforce the payment of alimony where it is decreed to be a lien on the property. Nor can the sale be classified as the conveyance of equitable title from one party to another under Section 17 (Ill.Rev.Stat. 1969, ch.40,par.18) or the conveyance of property as a settlement in lieu of alimony under Section 18 (Ill.Rev.Stat. 1969, ch.40, par.19.). Rather, the ordering of the sale under the circumstances here was in the nature of a partition (Ill.Rev.Stat. 1969, ch.40,par.17(a)). However, neither party prayed for a partition of the property and each claimed the entire interest in it. The court was therefore without jurisdiction to order the sale of this property. This provision of the decree is reversed.

In all other respects the judgment below is affirmed.

Affirmed in part, reversed in part.

THOMAS J. MORAN, J. and GUILD, J. concur.

71-145

STATE OF ILLINOIS

CITY OF LA SALLE VS. RICHARD F. MIGLIO



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,
on the 1st Day of January in the Year of our Lord one thousand
nine hundred and seventy-three, within and for the Third District
of Illinois:

Present— + PC

HONORABLE JAY J. ALLOY, Presiding Justice

HONORABLE ALBERT SCOTT, Justice

HONORABLE ALLAN L. STODER, Justice

HONORABLE WALTER DIXON, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on
February 9, 1973 _____ the Opinion of the
Court was filed in the Clerk's Office of said Court, in the words
and figures following, viz:

In The
APPELLATE COURT OF ILLINOIS

Third District

A. D. 1973.

CITY OF LASALLE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	LaSalle County.
)	
v.)	
)	
RICHARD F. MIGLIO,	)	Honorable
	)	Wendell Thompson
	)	Presiding Justice.
Defendant-Appellant.)	

PER CURIAM

Abstract

Appellant in this cause, Richard F. Miglio, appeals to this court from a judgment of the trial court finding defendant guilty of violating a certain ordinance of the city of LaSalle in which he was charged with disorderly conduct. In the brief filed in this court on behalf of appellant he asserts that the court erred in denying appellant's motion for directed verdict at the close of prosecution's evidence and, also, that the trial court erred in denying defendant-appellant's demand for a jury trial. No brief was filed on behalf of the city of LaSalle in this case although notice was given to the city of LaSalle by the clerk of this court that unless the brief was filed on behalf of the city of LaSalle, the case would be subject to reversal.

It appears from the brief on file (appellant's brief) that notwithstanding the demand for a jury trial by the appellant, the trial court rejected such written demand and denied defendant a jury trial. While the

incident occurred prior to July 1, 1971, and the trial after July 1, 1971, the effective date of the 1970 Illinois Constitution, under both the Illinois 1870 Constitution and the Illinois 1970 Constitution, the right to a trial by jury was available to defendant on demand. City of Danville v. Hartshorn, (No. 11395, 4th Dist. Ill. App. Ct., filed April 1971) 263 N.E. 2d 878; City of Chicago v. Harrington, 263 Ill. App. 47.

The judgment of the circuit court of LaSalle County in this cause is, therefore, reversed and the cause is remanded to such circuit court.

Reversed and Remanded.

9 I.A.³ 773

71-273

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss.
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 4th day of December, in the year of our Lord one thousand nine hundred and seventy-two, within and for the Second District of Illinois:

Present -- Honorable WILLIAM L. GUILD, Presiding Justice

Honorable MEL ABRAHAMSON, Justice

Honorable ALFRED E. WOODWARD, Justice

HOWARD K. KELLETT, Clerk

JOSEPH C. DORING, Sheriff

BE IT REMEMBERED, that afterwards, to wit: On

February 13, 1973 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

Abstract

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

BOISE CASCADE CORPORATION,)	
a Delaware corporation,)	
)	
Plaintiff-Appellee,)	
)	
vs.	)	Appeal from the Circuit
	)	Court of the Nineteenth
	)	Judicial Circuit, Lake
LIBERTYVILLE FEDERAL SAVINGS	)	County, Illinois
AND LOAN ASSOCIATION,)	
a Federal Savings and Loan)	
Association,)	
)	
Defendant-Appellant.)	

MR. JUSTICE ABRAHAMSON delivered the opinion of the court.

Libertyville Federal Savings and Loan Association brings this appeal from a judgment order entered May 14, 1971 in the circuit court of Lake County in favor of Boise Cascade Corporation in the amount of \$4,339.12 plus interest and costs. The opinion of the court, delivered to the respective counsel by mail, was incorporated into the order wherein the court found that Libertyville had entered into a binding contract with Boise Cascade to pay their invoice for a prefabricated home package, upon the performance of certain conditions, which it breached by making the payment to a third party.

Prior to May 31, 1969, Mr. and Mrs. Donald Makela entered into a contract with Har-Edwards Development Company, Inc. whereby Har-Edwards, as a general contractor, would construct a home on a lot owned by the Makelas. The Makelas, at approximately the same time, received a commitment from Libertyville for a conventional construction loan to finance the project to be secured by a first mortgage on the property.

The basic home material "package" was to be supplied by Kingsberry Homes, a division of Boise Cascade and a supplier of prefabricated homes, as a subcontractor of Har-Edwards. Kingsberry was unwilling, however, to supply its product to Har-Edwards on either the contractor's credit or on a cash-on-delivery basis and required a letter of credit from a financial institution assuring payment for the home package. Accordingly, Har-Edwards contacted Libertyville which adopted a form letter of credit provided by Har-Edwards and mailed it to Kingsberry Homes on May 31, 1969. That letter, which the parties agree was the only contract between the parties relative to this transaction, read as follows:

"Kingsberry Homes
5096 Peachtree Road
Chamblee, Georgia 30005

Attention: Credit Department ,

Gentlemen:

We agree to pay your invoice for approximately
\$4,337.22 covering the house package shipped to
Har-Edwards Development Co., Inc. at

MAY 1 1973



56341

JOHN BRAWKA,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	OF COOK COUNTY.
)	
v.)	
)	
BOARD OF FIRE AND POLICE COMMISSIONERS,)	
VILLAGE OF MELROSE PARK, COOK COUNTY,)	
ILLINOIS, et al.,	)	HONORABLE
	)	EDWARD J. EGAN,
Defendants-Appellants.	)	PRESIDING.

MR. PRESIDING JUSTICE DRUCKER delivered the opinion of the court:

The defendant, Board of Fire and Police Commissioners for the Village of Melrose Park, found the plaintiff guilty of violating three departmental rules and discharged him from his position as a lieutenant and member of the Village Police Department. Plaintiff appealed to the Circuit Court of Cook County under the Administrative Review Act (Ill. Rev. Stat. 1971, ch. 110, par. 264 et seq.) wherein the Board's decision was "Reversed or in the Alternative, * * * Reversed and Remanded." The court found: (1) that although the Board's findings of fact were not against the manifest weight of the evidence, they nevertheless did not constitute a violation of any of the three rules; (2) that the conduct of the Board and its legal advisor deprived plaintiff of a fair and impartial hearing; and (3) that the Board erred in admitting into evidence a transcript of the contents of a tape recording. The issues raised by defendants on appeal deal with the propriety of the above findings.

The charge against plaintiff was that on November 25, 1970, at 5:00 or 5:30 P.M., while assigned to duty in a Village patrol car, he negligently permitted his microphone switch to remain on and made the following statement to a private citizen who was seated next to him in the squad car:

Fuck the Chief's job I don't want it. I got my 20 years in and took care of myself for 40 years and don't need anything any more. I've

been on the take for 20 years but nobody knew about it. The Chief is a Jackoff and so is the Mayor, they are both with the syndicate.

The statement was said to have been transmitted over a radio frequency used by the Melrose Park and 17 other Police Departments.

The departmental rules plaintiff allegedly violated are:

Rule 3- No member of the Police Department shall conduct himself in a manner unbecoming a Police Officer * * *. All members of the Department shall * * * conduct themselves as gentlemen and shall be courteous in their conversation and actions with citizens, and no member * * * shall conduct himself in a careless or malicious manner whereby a citizen is injured or damage caused to his property.

Rule 19 - Members of the Department shall not use coarse, profane or insolent language in their conversation with citizens * * *.

Rule 37 - Radio communications shall be used for official business only. * * *. The use of disrespectful slurring or profane language is prohibited.

A summary of the evidence presented at the hearing follows:

The defendants called five witnesses who were in a position to hear the plaintiff's voice over the air at the relevant time. The first, Officer John Rago, was assigned to a patrol car with Officer Frank Paglini. At about 5:15 P.M. he tried to call the police station but there was "traffic" on the air and he couldn't get the call through. He heard foul language being transmitted and identified the voice as that of the plaintiff. The language heard was similar to that contained in the charge.

The second witness, Officer Frank Paglini, testified that he heard two voices over the air. He didn't recognize either of them. Paglini was closer to the radio receiver than was his partner Officer Rago; Paglini was the passenger and the radio receiver was located under the dashboard on the passenger's side. He did hear the words, "Fuck the Chief * * *. He is a Jackoff."

The other voice said, "Your name came up as Chief," and the first voice then replied, "I wouldn't want the job under them conditions with the syndicate and outfit telling you what to do." Paglini also testified that if someone has the department's radio frequency "tied up," another car is unable to transmit messages.

The third witness, Odene Schodtler, was the desk clerk at the Melrose Park police station. At about 5:30 P.M. on the evening in question a microphone "key" of a squad car was left open. She heard voices over the radio but couldn't make any sense out of them. One of the voices was the plaintiff's. An "open mike" causes some difficulty in receiving messages but communication with other stations is still possible.

The fourth witness, Officer August Argento, was assigned to a squad car with Officer Hillard Pulikowski. He recognized that from about 5:00 to 5:30 P.M. someone had left his microphone in an open position. He couldn't identify plaintiff's voice as one of the speakers. He saw plaintiff's squad car at Steve Horodovich's gas station and proceeded to drive into the station. Officer Pulikowski then asked plaintiff to check his "mike."

The fifth witness, Officer Hillard Pulikowski, testified that he did not recognize plaintiff's voice over the air at the time in question. He characterized the transmissions as "gibberish"; many conversations were overlapping; officers from many cars were trying to determine where the "open mike" was and there was the continuous sound of clicking microphone switches.

Plaintiff, Lieutenant John Brawka, was called as an adverse witness by the defendants. He has been a member of the Village Police Department for 20 years. At the relevant time he had parked his squad car in front of the door of Steve Horodovich's gas station. He used the station's washroom and as he walked

back to his car he conversed with Horodovich for three or four minutes. They talked about Horodovich's health. Horodovich also mentioned that he had heard plaintiff was being considered for the position of Police Chief. Plaintiff told him that under certain circumstances he would consider taking the position. Subsequently Officer Pulikowski came over to his car and asked him to "check his mike." He responded by depressing the button on its side. There is supposed to be a red light on when the transmitter is operating; he didn't know whether his car radio had an operable red light; the radio didn't have a green light which indicates when the radio is on.

Steve Horodovich was called as a witness by the defendants and later by the Board. He was questioned by the three Board members, the Board's attorney and the attorney for the complainant-Police Chief. He corroborated the testimony of the plaintiff except that he couldn't recall any conversation concerning plaintiff becoming Police Chief. As he stated, "[I]t could have been, but I really don't recall it, * * *." He further testified that at the end of their conversation plaintiff was opening the door to his squad car and he (Horodovich) was standing about three feet away in the station's doorway. At no time was he in the plaintiff's squad car. He had no interest in the outcome of the case.

Bernice Donovan, the desk operator at the River Forest Police Station, testified for the defendants. The Village keeps a recording of radio transmissions made in the area including those from Melrose Park. She possessed the tape of all transmissions between 4:00 P.M. and 6:00 P.M. on November 25, 1970. The machine had been in good operating condition that night and the tape was a true and correct reproduction of what was recorded. Over objection of plaintiff's counsel, Dominic Cimino, the

complainant and Police Chief of Melrose Park was asked, if able, to identify any voices on the tape. He labeled statements allegedly made by the plaintiff as "voice number one" and any other voice on the tape as "voice number two." After the tape was played, the court reporter, Lucia Coffey, said that she didn't understand anything on the tape. She was given a copy of the tape to enable her to replay it and then make a transcript of its contents.

The hearing was continued for three days at which time plaintiff called Lucia Coffey as his witness. She testified that she was unable to take notes of the contents of the tape when it was first played because:

[T]he tape was so unintelligible to me that I could not be helped by the Chief's attempt to tell me how to identify the voices.

After she was given a copy of the tape, she played it about ten times. She then took stenographer's notes of its contents.

Then, as she described:

I listened again, and again to the tape to be sure what I had put down on my machine was accurate * * * as I could do it. And then I typed it over and over until I got some sense out of it.

She didn't use the Police Chief's numbering system to identify the speakers but rather identified the voices of the plaintiff and Horodovich from her experience from listening to them testify at the hearing and by reading the charges against the plaintiff. On cross-examination, when asked whether she was "satisfied" with her voice identifications of plaintiff and Horodovich, she responded:

Well, the answer to that is that I heard the tape with the two voices, one was a foreign voice, an older man, and another was a Police Lieutenant. The two voices could be distinguished because of the differences in the people, I could distinguish two voices.

Over objection of plaintiff's counsel the transcript of the tape was introduced into evidence. The transcript shows that the voice identified as the plaintiff's made no derogatory statements about the Mayor or Police Chief; nor did he state that he had been "on the take." Some profane language was attributed to him but in the following context:

It's getting kind of fucking late. * * *
So like I say that fucking \$3000.00 makes
no fucking difference to me.

Much of the transcript contains a series of short interrupted messages by unidentified speakers.

Plaintiff testified in his own behalf. He again acknowledged that he did have a conversation with Horodovich but denied making the statements contained in the charge. To his knowledge his radio key was not open at the time. He had heard the tape recording three times and couldn't identify any of the voices therein. During his 20 years with the Village Police Department he has never been suspended or disciplined.

Opinion

The first issue raised by defendants on appeal is the propriety of the court's determination that even if the Board's findings of fact were not against the manifest weight of the evidence, they nevertheless failed to constitute a violation of any of the three departmental rules.

We believe the recent case of Rogenski v. Bd. of Fire & Police Commissioners, 6 Ill. App.3d 604, 285 N.E.2d 230 (Lv. to App. den. 52 Ill.2d xiv), is dispositive here and calls for an affirmance of the circuit court's decision. In Rogenski a police officer was charged, in part, with violating departmental rules similar to Rules (3) - conduct unbecoming an officer, and (19) - use of coarse, profane or insolent language, in the instant case. The facts in Rogenski showed that the officer was

engaged in an extended conversation with a "civilian" friend while driving in his squad car. Unbeknown to the conversants, the microphone switch was stuck in a position causing their remarks to be broadcast over the air. The officer made derogatory statements concerning the wife of a mayoral candidate in an upcoming election and used the words "damn," "hell," and "perhaps other swear words." In affirming the decision of the circuit court which reversed the Board's finding of violations, the court stated at 610:

We believe that these rules, * * *, should be considered as applying only to a policeman's behavior in public, and as not extending to a private conversation which is not intended to be overheard. If construed to apply to the latter, the rules would fall within the sweep of Mueller v. Conlisk, 429 F.2d 901 [7th Cir. 1970], which struck down a rule of the Chicago police department with these remarks:

"Thus it is clear that the First Amendment would reach and protect some speech by policemen which could be considered 'derogatory to the department.' Rule 38 on its face prohibits all such speech, even private conversation, and is for that reason unavoidably overbroad in violation of the First Amendment * * *."

Furthermore, it is evident that the allegedly profane words were not spoken with an intent to disturb or offend * * * [the passenger in the officer's car], the only hearer of which * * * [the officer] was aware, and so for lack of this intent, also, the language the Captain used should not be considered as within the meaning of * * * [the rules analogous to Rules (3) and (19) here]. Karp v. Collins, 310 F. Supp. 627.

Rogenski is also dispositive as to the alleged violation of Rule 37 which states that, "Radio communications shall be used for official business only" and the use of disrespectful or profane language is prohibited. In the instant case no evidence was presented which tended to show that plaintiff was aware or should have been aware of the fact that his radio was set in a position permitting transmission of messages. To the contrary,

the evidence shows that the alleged conversation took place outside the squad car; that plaintiff's radio was defective in that it lacked a green light indicator that the radio was on; that there is supposed to be a lighted red warning light when one transmits messages but plaintiff didn't know if his red light was operable. The charge against plaintiff was that he "negligently" permitted the microphone switch to remain in a "transmitting position" but the Board made no specific finding that plaintiff was negligent. In Rogenski at 610, 611, the court stated:

This leaves for consideration only the charge that * * * [the officer] was guilty of "neglect or inattention to duty" because he left the transmitter switch on in his police car for an hour and thereby interfered with police radio traffic, and also the question whether his being guilty of this would warrant his discharge. The Board made no findings of fact to establish precisely in what way the Captain was at fault. There was evidence that the microphone was defective, and that the red warning light indicating when it was in operation was positioned where it could be obscured by the driver's knee. We believe specific findings of fact should have been made. Sudduth v. Board of Fire & Police Comm'rs of the City of Rockford, 48 Ill. App.2d 194, 204. See also Vahle v. Zoning Board of Appeals of the City of Canton, 97 Ill. App.2d 165; International Harvester Co. v. Zoning Board of Appeals of the City of Chicago, 43 Ill. App.2d 440, 448-49.

Specific findings of fact relative to the ways in which * * * [the officer] was guilty of neglect or inattention to duty would have helped a reviewing court to decide whether removal from office was an appropriate penalty, or on the contrary, was arbitrary or unreasonable. It is established that the authority given a board of fire and police commissioners to remove for cause is not an arbitrary one but is to be exercised on just and reasonable grounds, and, further, that "cause" means some substantial shortcoming which renders the continuance of the officer in his office detrimental to the discipline or efficiency of the service. (Fantozzi v. Board of Fire and Police Commissioners of the Village of Villa Park, 27 Ill.2d 357.) We are not given findings to aid us in applying the rules of Fantozzi. Nevertheless, from our review of the record we find that there is no substantial evidence to support this last charge.

In the instant case also there is no substantial evidence to support the charge that defendant negligently allowed his microphone switch to remain in a transmitting position.

Reference has been made by both parties to Kammerer v. Bd. of Fire & Police Com., 44 Ill.2d 500, 256 N.E.2d 12, wherein a police officer was discharged for rule violations which included the misuse of a squad car microphone. Kammerer is distinguishable from the instant case since there the misuse of the microphone was intentional.

In view of the position we have taken we need not consider the court's findings that plaintiff was deprived of a fair hearing or that the tape recording was improperly admitted into evidence. However, we add that upon a full review of the record, it is our belief that there is insufficient evidence to support the Board's finding that plaintiff was the "voice on the air" during the time in question. Only one witness, Officer John Rago, could identify the plaintiff as the speaker. His partner, Officer Frank Paglini, could not make a voice identification despite the fact that he was in a better position to hear what was being transmitted than Officer Rago since he sat closer to the receiver. The three other witnesses in a position to make a voice identification (Odene Schodtler, Officer August Argento and Officer Hillard Pulikowski) were unable to do so. The witnesses gave varied accounts as to what they heard. It is apparent that at the time, the radio frequency was jammed with sporadic statements by various persons and the continuous sound of clicking microphone switches; the great difficulty which the court reporter had in attempting to make a transcript of the tape recording bears this out. These facts and the additional facts that plaintiff (as corroborated by Horodovich) consistently denied making the statements and that he had a long unblemished

record with the Village Police Department lead us to conclude that the Board's findings were against the manifest weight of the evidence.

The judgment of the circuit court reversing the Board's order discharging plaintiff from his position as Lieutenant on the Village's Police Department is affirmed.

The trial court's alternative judgment "that the Board's order be reversed and remanded" is reversed.

AFFIRMED IN PART;
REVERSED IN PART.

English and Lorenz, JJ., concur.

Abstract only.



ABST.

55599

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
LAWRENCE EDGESTON,	)	Hon. Kenneth Wendt,
	)	Presiding.
Defendant-Appellant.)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

After a bench trial, Lawrence Edgeston, (defendant) was found guilty of attempt murder (Ill.Rev.Stat. 1971, ch.38, par. 8-4) and also of aggravated battery (Ill.Rev.Stat. 1971, ch.38, par.12-4(b-1).) The court sentenced him to two concurrent terms of one to three years in the penitentiary. In his appeal to this court, he urges that his identification was constitutionally impermissible and that his guilt was not proved beyond a reasonable doubt.

Two credible witnesses testified that defendant, while walking among a group on the street, fired twice from a shotgun. One shot struck the complaining witness and injured him to an extent requiring hospitalization. It was approximately 6:30 p. m., during March, and the testimony is that it was getting dark and the street lights were starting to come on. One of the identifying witnesses was the complainant who was some seven feet away from defendant. The other witness was approximately 15 feet away. The complainant testified that he had a very good opportunity to observe defendant. Complainant was in the hospital for some three-and-one-half weeks but no identification was made during this time. The other prosecution witness had seen the defendant several times prior to the incident. This other witness testified that he was able to see

everything during that time. He identified defendant after the occurrence at the police station.

Defendant first urges that the police were given a vague description and that there was no lineup as a basis for the in-court identifications. People v. Horodecki, 15 Ill.2d 130, 135, 154 N.E.2d 67, cited by defendant, points out that the usual lineup under proper safeguards would considerably strengthen an in-court identification. However, the court went further and held that absence of lineup does not itself render the identification incompetent and does not alter the rule of law that identification is a matter of credibility of the witnesses. (People v. Hudson, 5 Ill.App.3d 686, 690, 284 N.E.2d 33; also People v. Brinkley, 33 Ill.2d 403, 406, 211 N.E.2d 730.) We find from all of the evidence that defendant was positively identified by two credible witnesses who had a good and uninfluenced opportunity to observe him during the commission of the crime. This factor eliminates defendant's attack upon the validity of the in-court identifications. See People v. Fox, 48 Ill.2d 239, 245, 269 N.E.2d 720.

The evidence of guilt of both offenses charged is sufficient beyond a reasonable doubt. Defendant testified in his own behalf and admitted that he was present at the scene but stated that he did not fire the gun. This testimony served merely to create a conflict in the evidence which it was the duty of the trial court to resolve. Certainly we cannot say that the evidence here leaves a reasonable doubt as to defendant's guilt. People v. Catlett, 48 Ill.2d 56, 64, 268 N.E.2d 378.

One point raised by this record requires clarification. At the close of the case, the court expressly found defendant guilty of both offenses and pronounced sentence of one to three

years in the penitentiary. Answering an inquiry by defendant's counsel, the court stated that the sentences were to be concurrent. This appears amply from the report of proceedings. However, the common law record as presented to us reflects only the finding, judgment and sentence for the offense of attempt murder.

The evidence shows that both charges here grew out of one act and one single transaction. Under these circumstances, one sentence should have been imposed, for the greater offense. (People v. Brown, 52 Ill.2d 94, 103-104, 285 N.E.2d 1.) Therefore, the judgment appealed from will be modified by reversal thereof insofar as it shows conviction and sentence for the lesser offense of aggravated battery. As thus modified to reflect only a judgment and sentence of one to three years for attempt murder, the judgment appealed from is affirmed.

Judgment affirmed as modified.

BURKE, P.J. and EGAN, J. concur.



ABST.

55976

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
JOHN L. BOYCE,	)	Hon. Robert J. Collins,
	)	Presiding.
Defendant-Appellant.)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

After a bench trial, John L. Boyce, (defendant), was found guilty of rape (Ill.Rev.Stat. 1971, ch.38, par.11-1(a),) and also of armed robbery (Ill.Rev.Stat. 1971, ch.38, par. 18-2.) He was sentenced to one term of five to 12 years in the penitentiary.

On his appeal to this court, he contends that he was denied due process of law because of the suggestive nature of the show up identification by the prosecutrix; he was not proven guilty beyond a reasonable doubt due to conflicting testimony; the court erred in finding him guilty of a greater crime than that with which he was charged, and that his sentence cannot be accurately determined.

The victim testified that about 7:00 a. m. the defendant followed her on an Elevated platform and demanded money from her. He hit her several times, robbed her of a pill box, a Timex watch and some currency. He then knocked her down, tore her clothing, pulled out her Tampax and raped her. She testified that she had a good view of his face during the time of the incident, approximately ten minutes.

Two police officers testified that they responded to a radio message of a robbery in progress. When they arrived at the scene, they saw the defendant running from behind a

C.T.A. platform booth. They never lost sight of him and one of them apprehended him just inside the turnstile. He searched the defendant and discovered the pill box, Timex watch and currency, later established to be the property of the victim. A third officer, responding to the same call, testified that he saw the defendant running northbound on Damen where he was apprehended.

The defendant was placed in a police squadrol and the victim approached with the understanding that the officers had caught the man who attacked her. She testified that the lighting in the squadrol was good and that she was able positively to identify the defendant as her attacker. She was taken to the hospital in the afternoon and brought to the police station in the evening, where she again viewed the defendant without a lineup. A microanalyst testified that there were blood and mucous, but no sperm stains, on defendant's undershorts. There was sperm on the Tampax taken from the prosecutrix.

Defendant testified that he had left his girl friend's apartment at about 5:45 a. m. in the morning. Shortly thereafter, he was arrested and searched by the police. His girl friend testified that he had been with her from 3:00 a. m. until 5:00 a. m., during which time they had intercourse twice and that she had been menstruating.

At trial, defendant's motion to suppress statements made by him at the police station was sustained, but the motion to suppress the identification was denied.

Defendant's first contention, which seeks to attack his identification, has no merit. The identification of defendant by the victim while he was in the police vehicle was a prompt

on-the-scene identification which did not violate any rights of the accused. (People v. Elam, 50 Ill.2d 214, 218, 278 N.E. 2d 76.) In addition, regardless of the merits of this procedure, the in-court identification was proper because it was, in fact, based upon a sufficient uninfluenced and untainted observation of the defendant during commission of the crime. As shown, this occurred during morning hours and the victim had a good view of defendant for approximately ten minutes. People v. Fox, 48 Ill.2d 239, 245, 269 N.E.2d 720.

We find from our review of the entire record that the evidence of guilt is beyond reasonable doubt. The victim's evidence was sufficient to prove guilt. Possession by defendant of her property further strengthened the State's case. The question of the credibility of the evidence tendered by defendant was a matter for determination by the trial court. There is no reasonable doubt as to defendant's guilt and the finding of guilty is proper in all respects. People v. Catlett, 48 Ill.2d 56, 64, 268 N.E.2d 378.

Defendant's final point involves the sentence. In the indictment, defendant was charged with forcible rape and with simple robbery. The common law record purports to show that the trial court found defendant guilty of rape and of armed robbery, entered judgment on these findings and sentenced defendant to the penitentiary for five to 12 years for rape. The report of proceedings shows clearly that the sentence was imposed for rape. The court commented directly upon the fact that the minimum permissible sentence for that crime was four years. Therefore, if it be concluded that defendant was sentenced for the crime of armed robbery, that judgment and sentence should be reversed. Defendant was not charged with armed robbery in the indictment.

Accordingly, the judgment appealed from will be modified by reversing the sentence appearing in the common law record for armed robbery. The judgment and sentence for five to 12 years for the crime of rape are affirmed.

Judgment affirmed as modified.

BURKE, P.J. and EGAN, J. concur.



ABST.

56826

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
BOOKER ROBINSON and)	
JEROME WASHINGTON,	)	Hon. James H. Felt,
	)	Presiding.
Defendants-Appellants.)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

After trial by jury, Booker Robinson and Jerome Washington (defendants) were found guilty of burglary. (Ill.Rev. Stat. 1971, ch.38, par.19-1.) Defendant Washington was sentenced to ten to 20 years and defendant Robinson to eight to 20 years in the penitentiary. Defendants appeal, urging only that they were deprived of a fair trial because of prejudicial final argument by the State's Attorney.

In this case, the evidence is not so unsatisfactory as to leave a reasonable doubt as to defendants' guilt. (Supreme Court Rule 23(c), adopted effective January 31, 1972.) On the contrary, after review of the record, we find expressly that the evidence of guilt of both defendants is overwhelmingly beyond any reasonable doubt. Counsel for defendants, wisely, made no issue as to the sufficiency of the evidence.

In a situation of this type, no error of law appears. On one occasion, the State's Attorney, referring to the lack of fingerprints, and apparently also to a crowbar found on the premises when defendants were arrested, used the words, "a professional burglar's tool." On two more occasions, the

State's Attorney used the expression "professional burglar." In all three of these instances, counsel for defendant objected and all objections were promptly sustained. The court instructed the jury that argument made by the attorneys, not based on the evidence, should be disregarded. (IPI--Criminal 1.03 at page 7.) While we condemn this type of argument, we find that the verdict could not have been otherwise had the improper remarks not been made. Any jury of 12 reasonable men and women could hardly refrain from finding defendants guilty upon the evidence presented. (People v. Davis, 46 Ill. 2d 554, 560, 264 N.E.2d 140.) The judgment is accordingly affirmed as to both defendants. An opinion by this court would have no precedential value.

This opinion is filed and the case disposed of pursuant to Illinois Supreme Court Rule 23, adopted effective January 31, 1972.

Judgment affirmed.

BURKE, P.J. and EGAN, J. concur.

MAY 1 1973

No. 56325

UBALDO MARTINEZ,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
vs.)	
)	
AURELIA VALDEZ,	)	HONORABLE
	)	NORMAN C. BARRY,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM (First District, Third Division):

A default was entered against defendant, Aurelia Valdez, and others in a dram shop action. A jury assessed plaintiff's damages in the sum of \$10,000, and judgment was entered thereon. Defendant subsequently filed a petition to vacate the judgment pursuant to Section 72 of the Civil Practice Act, and the petition was denied. (Ill.Rev.Stat. 1971, ch. 110, par. 72.) Defendant appeals.

Upon receipt of summons by defendant in the dram shop action the matter was turned over to the dram shop insurance carrier. On October 1, 1964, an appearance for the defendant (and others named as defendants in the action) was filed by the law firm of Mullen, Rosenbloom and Zun, counsel chosen by the insurance carriers, and an answer was filed. On April 18, 1967, that law firm withdrew as defense counsel on the ground that the insurance carrier had become insolvent, and defendant and the others were advised of the withdrawal by certified mail. A letter dated May 1, 1969, and filed with the clerk of the circuit court on May 7, 1969, was sent by plaintiff's counsel to the defendant and others, advising them that the dram shop matter was set for trial on May 7, 1969, and informing them of the time and place where the trial was to be held.

No one apparently appeared for the defendant or the others on that date, and on June 3, 1969, plaintiff filed a motion for a directed verdict, the jury was directed to find for plaintiff and against defendant and two others, the jury assessed damages, and judgment was entered thereon.

Defendant filed the instant Section 72 petition on February 11, 1971, alleging the fact of the entry of the default judgment; and further alleging that she has "a meritorious defense to that action"; that the default was taken "without any lack of diligence, fault or negligence" on her part; and that her attached affidavit would substantiate that she was not guilty of lack of diligence. She requested that the default and judgment be set aside and that the matter be reinstated for trial.

In the affidavit filed in support of her petition, defendant stated that she had been served with summons in the dram shop action; that she so informed her insurance company, which in turn informed her that its attorneys would defend the action; that she was later informed by the company that it was insolvent and that its attorneys were allowed to withdraw as defense counsel; that she gave those notices to her former husband who was to engage "one of said attorneys to continue in her behalf"; that a separate and unrelated action was filed against her, in which attorney Alvin Rosenbloom was representing her; that in discussing the said unrelated case with Rosenbloom the affiant showed him the summons and complaint in the instant Martinez case which she had retained; that she was subsequently informed by her counsel that a judgment was entered in the Martinez case; and that she immediately requested him to represent her in the case and to do all necessary to secure a trial.

Also attached to the petition was the affidavit of attorney Alvin Rosenbloom, who stated that he represented Aurelia Valdez in the unrelated case of Alarcon v. Valdez; that he requested, in the fall of 1970, all papers which she had in regard to the Alarcon case; that among those papers was a summons and complaint in the Martinez case; that upon questioning of Aurelia Valdez it was learned that she was under the impression that the affiant was representing her in the Martinez case; that it was later determined that a judgment was taken against Aurelia Valdez in the Martinez case; and that he had spoken to interested persons, had checked

the Illinois Insurance Department file, and believed that a meritorious defense exists in the Martinez case.

At the hearing on the Section 72 petition the court and counsel for both sides engaged in general discussion regarding the law applicable in Section 72 matters and regarding the specifics set out in the instant petition and affidavits. Defense counsel requested that he be allowed to amend the petition, "to clear the facts," and the court responded that the facts were well stated in the documents already on file, to which defense counsel agreed. The hearing was continued for several weeks to afford counsel an opportunity to familiarize themselves with certain cases applicable to Section 72 matters. At the second hearing defense counsel related that the court theretofore refused to allow an amendment to the petition on file, and the court denied the petition for lack of diligence on defendant's part.

Defendant contends on appeal that the trial court erred in denying leave to file an amended Section 72 petition, and that the trial court based its denial of the petition upon the incorrect interpretation of the applicable law.

The allowance or denial of an amendment to a pleading, or the like, rests within the discretion of the trial court; where the proposed amendment does not appear in the record, a court on review is reluctant to interfere with the exercise of that discretion, and it will be assumed that a denial of leave to file the amendment was a proper exercise of that discretion and was not prejudicial to the party requesting it. Lowrey v. Malkowski, 20 Ill.2d 280, 170 N.E.2d 147; Zamouski v. Gerrard, 1 Ill.App.3d 890, 275 N.E.2d 429.

The request to amend was made by defense counsel at the first hearing on the petition. Defendant had ample time to prepare and proffer the desired amendment between then and the second hearing, but failed to do so. No such amendment appearing of record, we are of the opinion that the trial court did not abuse its discretion in denying leave to amend.

The cases cited by defendant are not in point: See e.g. Williams v. Fredenhagen, 350 Ill.App. 2d, 111 N.E.2d 578; Frandsen v. Anderson, 108 Ill.App.2d 194, 247 N.E.2d 186; Smith v. Pappas, 112 Ill.App.2d 129, 251 N.E.2d 390.

Defendant also contends that the trial court incorrectly applied the law in denying the petition. We disagree.

The procedures provided for under Section 72 of the Civil Practice Act were intended to protect a party against whom a default judgment has been entered from unjust, unfair and unconscionable circumstances attending the entry of such judgment, but were not intended to protect him from the consequences of his own mistake or neglect. Esczuk v. Chicago Transit Authority, 39 Ill.2d 464, 236 N.E.2d 719; Elfman v. Evanston Bus Co., 27 Ill.2d 609, 190 N.E.2d 348; Ellman v. DeRuiter, 412 Ill. 285, 106 N.E.2d 350.

Although the failure of a plaintiff, who receives a default judgment against a defendant, to execute that judgment within 30 days of its rendition "casts a cloud" upon the proceedings, the defendant must nonetheless show due diligence in seeking the vacatur of that judgment. Houston v. Churchill, 100 Ill.App.2d 56, 241 N.E.2d 560.

After the attorneys who represented the defendant and the others at the instance of the insurance carrier's withdrawal from the case in April of 1967, defendant entrusted securing continued legal representation by one of those attorneys to her husband. Approximately one week prior to the date set for trial in May of 1969, defendant was notified of that fact by plaintiff's counsel. Defendant learned "in the fall of 1970" that the default judgment had been entered against her, but the petition to vacate that judgment was not filed until mid-February of the following year. Finally, the petition alleges only that defendant has a meritorious defense and that there was no lack of diligence on her part; both of these allegations are conclusions, unsupported by any facts. The petition was properly denied.

While the trial court stated that under the Esczuk case,

it had no jurisdiction to act, the record clearly shows that the petition was denied because of lack of diligence on defendant's part in maintaining her defense.

The cases cited by defendant are governed by their own facts and for that reason are distinguishable from the case at bar.

For these reasons, the order is affirmed.

Order affirmed.

Per curiam.



MAY 1 1973

No. 57152

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Respondent-Appellee,	)	COOK COUNTY.
)	
vs.)	
)	
PURCELL MOORE,	)	HONORABLE
	)	JOHN C. FITZGERALD,
Petitioner-Appellant.	)	PRESIDING.

PER CURIAM (First District, Third Division):

Petitioner, Purcell Moore, was found guilty of burglary and was sentenced to a term of 10 to 20 years in the penitentiary. On direct appeal to the Supreme Court the judgment of conviction was affirmed. (People v. Moore, 43 Ill.2d 102, 251 N.E.2d 181.) On January 22, 1970, petitioner filed a pro se petition pursuant to the Illinois Post-Conviction Hearing Act, alleging a violation of his constitutional rights at and prior to trial. (Ill.Rev.Stat. 1969, ch.38, par.122-1 et seq.) On motion of the State, the petition was dismissed and appeal of that order was taken to the Illinois Supreme Court which subsequently transferred the cause to this court.

The pro se petition and the supporting affidavits, totaling 33 pages, recited and averred factual matters relative to the events surrounding petitioner's arrest and to certain one-to-one pretrial confrontations which took place between the prosecuting witness and the petitioner. Petitioner alleged that those matters were never brought to the attention of the trial court and he contended those matters tainted both the arrest and subsequent search and the in-court identification.

At the hearing on the State's motion to dismiss the petition, the petitioner's counsel (an assistant public defender) represented to the court that a member of his office interviewed the petitioner the day after the pro se petition was filed; that counsel read the trial record, interviewed petitioner's trial counsel, read the Supreme Court decision in the direct appeal of petitioner's conviction, and reviewed his file and the questionnaire

12 : 4

filled out by petitioner; and that he could find no violation of petitioner's constitutional rights occurring before or during the trial. Counsel moved that the petition be withdrawn without prejudice. The motion was denied and the petition was dismissed on grounds of res judicata.

In an appendix to his brief on this appeal, filed by appointed private counsel, petitioner has attached an additional affidavit wherein he alleges in essence that he informed his trial counsel of all factual matters which are contained in his pro se petition; that the assistant public defender who interviewed petitioner stated that trial counsel was "very incompetent" and that such matter would appear in the post-conviction petition; and that trial counsel admitted his incompetency to the court after trial off the record.

Petitioner contends here that his post-conviction counsel was incompetent, in that he failed to raise the issue of trial counsel's incompetency, and that trial counsel's incompetency is in turn evidenced by his failure to move to suppress evidence seized from him after the allegedly illegal arrest and by his further failure to move to suppress any in-court identification as having been tainted by the improper pretrial confrontations.

The case of People v. Slaughter, 39 Ill.2d 278, 235 N.E. 2d 566, recites that the Post-Conviction Hearing Act contemplates that counsel appointed to represent an indigent petitioner should consult with him either by mail or in person, ascertain his alleged grievances, examine the trial record, and amend, if necessary, the pro se petition to make it adequately present the petitioner's constitutional contentions (39 Ill.2d at 285; 235 N.E.2d at 569).

It is apparent from the foregoing statement from the record that petitioner's post-conviction counsel's conduct is within the mandate of the Slaughter case and its implementing Supreme Court Rule 651(c). Ill.Rev.Stat. 1971, ch.110A, par.651.

Nor do the bases of petitioner's claim of incompetency on the part of trial counsel have merit. It appears from the

Supreme Court decision which affirmed the conviction that the prosecuting witness's in-court identification of the petitioner had an origin independent of the other allegedly tainted pretrial confrontations. Further, it appears from those factual matters alleged in the pro se petition that there was probable cause upon which to predicate petitioner's arrest after the burglary. Quite apparently the failure of trial counsel to file motions to suppress in those regards was trial strategy, rather than incompetence. The fact that petitioner may have been told by an assistant public defender during the interview that trial counsel was incompetent does not take into consideration the additional factors gone into by a different assistant public defender prior to the hearing.

As to petitioner's claim that res judicata should not be mechanically applied in this case, it need only be said that both matters raised as to the incompetence of trial counsel were or could have been raised before either the trial court or the Supreme Court on direct appeal. (People v. Derengowski, 44 Ill.2d 476, 256 N.E.2d 455.) The circumstances of this case are not such as to raise it to the status of a "case of special circumstances" as is the situation in the cases cited by petitioner. See People v. Williams, 36 Ill.2d 194, 222 N.E.2d 321; People v. Hamby, 32 Ill.2d 291, 205 N.E.2d 456; People v. Keagle, 37 Ill.2d 96, 224 N.E.2d 834. Also distinguishable from the case at bar are petitioner's cited cases of People v. Somerville, 42 Ill.2d 1, 245 N.E.2d 461; People v. Pruitt, 79 Ill.App.2d 209, 223 N.E.2d 537.

For these reasons the order is affirmed.

Order affirmed.

Per Curiam.



ABST.

55982

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	OF COOK COUNTY.
)	
v.)	
)	
JOSEPH L. MONTGOMERY,	)	HONORABLE
	)	MINOR K. WILSON,
Defendant-Appellant.)	)	PRESIDING.

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Defendant was found guilty at a bench trial of the crime of robbery and was sentenced to a term of two years to six years in the penitentiary. On appeal he contends that lineup identifications of him were improperly acquired thereby tainting the resulting in-court identifications, and that he was improperly denied counsel at the lineup.

Defendant testified at the hearing on his pretrial motion to suppress the identifications that he was placed under arrest on February 27, 1969, in a drugstore across the street from the Chicago Transit Authority (CTA) bus barn located at 69th Street and Ashland Avenue and was accused of the commission of a robbery of a CTA bus driver on February 3, 1969, which he denied. He testified that he was then transported to the police station where he was viewed in a lineup by two CTA bus drivers and identified as the robber after one of the drivers was unable to recognize him and after he (defendant) was required to place the hood on the jacket he was wearing over his head. He further testified that prior to the lineup he requested, and was denied, the presence of a lawyer.

CTA patrolman Edward Garner testified at the hearing that he and his partner arrested defendant on February 27, 1969, for trespass after they received a radio call of "suspicious persons" on the CTA property and had observed the defendant and a companion for about an hour prior to the arrest. He testified that

defendant fit the description which he had of the February 3rd robber, which he received about a week after the robbery. He further testified that the defendant was placed in a lineup after his arrest and was identified by two CTA bus drivers. He stated that the two identifying witnesses had no opportunity to view the defendant at the police station prior to the lineup.

Edward Ojer testified at the hearing that on February 3rd he drove his bus into the CTA yard in question after his day's work and was directed to a portion of the yard near a lighted washrack by two persons with a flashlight who were dressed as mechanics. One of the men, identified by the witness as the defendant, boarded the bus and told the witness to turn off the bus' lights. The witness told defendant that he (the witness) would have to read the bus meter first, the defendant got off the bus and the witness read the meter, after which he turned off the bus' lights. The defendant and a companion then re-boarded the bus and the defendant knocked the witness to a seat and robbed him. The witness stated that during the robbery the defendant's face was about two feet from the witness' face for about five minutes. The witness could see the defendant's entire face but not his hair because it was covered by the jacket hood. Lights from the washrack illuminated the inside of the bus. The next time the witness saw the defendant was on the 27th of February at a lineup. He testified that he recognized defendant immediately upon entering the lineup room, that defendant had on the same jacket that he wore on the night of the robbery, that the witness hesitated in identifying him because defendant did not have the hood to the jacket on his head, and that he identified the defendant after the hood was put on.

Casey Lusk testified at the hearing that he too was employed

as a CTA bus driver and that on the evening of February 3rd he saw the defendant hurriedly pass him as the witness was walking to the CTA office after finishing his day's work. He saw the defendant's face and gave a description of defendant to the police later that evening after learning of the robbery. The witness next saw the defendant on the evening of February 27th at the CTA yard about the same time as he saw him before; defendant was dressed in the same manner as he was on the previous occasion. Defendant's presence was reported to the witness' superior. The witness next saw the defendant in the police station later that night where, in a lineup, he identified the defendant as the man he had seen at the CTA yard on February 3rd; the witness was not certain whether or not the defendant was wearing the jacket when he identified him at the lineup.

The motion to suppress was denied. At the trial of the case Garner, Ojer and Lusk testified for the State substantially the same as they had at the pretrial hearing.

Defendant contends that it was error to require him to wear the hooded jacket at the lineup and that such tactic lent itself to an irreparable mistaken identification.

It is not improper to have clothing worn by a person suspected of a crime placed on that person as an additional identifying element. People v. Mason, 86 Ill. App.2d 28, 229 N.E.2d 392. Furthermore, one witness identified defendant without being sure that he was wearing the jacket at the time.

Apart from the manner in which the lineup was conducted, it is clear from the evidence that the in-court identifications given by Lusk and Ojer had sources independent of the lineup confrontation. An in-court identification will not be denied admissibility where it is based upon such independent origin. See People v. Pierce, ____ Ill.2d ____, ____ N.E.2d ____,

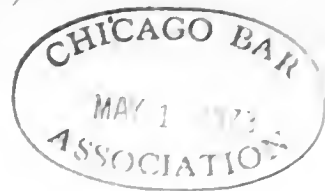
(No. 43452, November 1972 term), and People v. Patrick, ____
Ill.2d ____, ____ N.E.2d ____, (No. 43851, November 1972 term).

As to defendant's contention that it was improper to deny his alleged request for counsel at the pre-indictment lineup, the recent case of Kirby v. Illinois, 406 U.S. 682, has held that a suspect has no constitutional right to counsel at such time. Kirby is applicable to this case.

The judgment is affirmed.

AFFIRMED.

Abstract only.



56346

ROBERT J. LO CASCIO,)	
)	
Plaintiff-Appellant,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
v.)	
)	
PETER KIOUSIS,	)	HONORABLE ALBERT E. HALLETT,
	)	Presiding.
Defendant-Appellee.)	

MR. JUSTICE EGAN delivered the opinion of the court:

The trial court dismissed the amended complaint for alienation of affections on the grounds it did not state a cause of action. The complaint alleged as follows: the plaintiff was married to Arleen LoCascio and that he had her love and affection; the defendant did wickedly, maliciously, wantonly and intentionally overcome said devotion resulting in loss of affection and family; the plaintiff has thereby lost the society, affection, assistance, comfort and consolation of his family life; as a result of these acts by defendant, plaintiff has been damaged in that (1) he was forced to hire an attorney to defend his wife's divorce action, (2) he was hindered from attending and transacting his business, (3) he was forced to maintain a separate household, (4) he was compelled to pay child support, and (5) he suffered a financial loss on the sale of the family home.

The elements necessary to state a cause of action for alienation of affection were stated in Farrier v. Farrier, 46 Ill. App.2d 471, 197 N.E.2d 163:

To sustain a cause of action plaintiff must allege and prove (a) love and affection of the spouse for plaintiff, (b) overt acts, conduct or enticement on the part of the defendant causing these affections to depart and (c) actual damages.

Ill.Rev.Stat. 1971, ch. 68, secs. 34-37 governs all alienation of affections actions. Ill.Rev.Stat. 1971, ch. 68, sec. 35 reads:

The damages to be recovered in any action for alienation of affections shall be limited to the actual damages sustained as a result of the injury complained of.

Section 37 specifically excludes certain elements which are not to be considered in determining damages. Ill.Rev.Stat. 1971, ch. 68, sec. 37 reads:

In determining the damages to be allowed in any action for alienation of affections, none of the following elements shall be considered: the wealth or position of defendant or the defendant's prospects of wealth or position; mental anguish suffered by plaintiff; any injury to plaintiff's feelings; shame, humiliation, sorrow or mortification suffered by plaintiff; defamation or injury to the good name or character of plaintiff or his or her spouse resulting from the alienation of affections complained of; or dishonor to plaintiff's family resulting from the alienation of affections.

Kniznik v. Quick, 130 Ill.App.2d 273, 279-280, 264 N.E.2d 707

is dispositive of many of the issues raised by the pleadings here. In that case the court specifically held that attorney's fees and loss of earnings and profits may not be recovered in a suit for alienation of affections. The plaintiff claims in the case at bar that he was damaged because he was forced to maintain a separate household; in the Kniznik case the plaintiff sought damages "for household services to maintain his home." The court held that this allegation was "too tenuous and remote for causal relation to defendant's wrongful act."

Plaintiff's fourth claim for damages is that he will be required to pay child support. The support of one's children is a legal obligation whether or not there is a marriage existing and failure to support one's children is a criminal offense, Ill.Rev.Stat. 1971, ch. 68, sec. 24. The legal duty to support

one's children bears no relationship to the defendant's alleged wrongful acts.

The plaintiff's final claim for damages is that he suffered a financial loss in the sale of the family home. The sale of real property, which plaintiff was under no legal duty to make, bears no causal relationship to defendant's acts and is not recoverable as an element of damages.

For the foregoing reasons, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. and GOLDBERG, J. concur.

ABSTRACT ONLY.



56534

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
v.)	
)	
JERRY JOHNSON,	)	HONORABLE DANIEL J. WHITE,
	)	Presiding.
Defendant-Appellant.)	

MR. JUSTICE EGAN delivered the opinion of the court:

The defendant, Jerry Johnson, was found guilty after a bench trial of the crime of theft in violation of Section 16-1 (a)(1) of the Criminal Code (Ill.Rev.Stat. 1971, ch. 38, par. 16-1 (a)(1)), in that on July 28, 1971, at 104th and Normal, City of Chicago, County of Cook, State of Illinois, he knowingly obtained unauthorized control over certain property, namely \$14.00 of United States currency, the property of Otha L. Griffin, Jr., with the intent to deprive said Otha L. Griffin, Jr. permanently of the use and benefit of said property. The defendant was sentenced to a term of one year in the House of Correction.

The sole issue raised by the defendant on appeal is whether the State failed to prove the defendant guilty of the crime of theft beyond a reasonable doubt.

Otha L. Griffin, Jr. testified he lived at 10617 South Normal in Chicago. He was on his way home from work when he got off the bus at 103rd and Normal and was robbed by the defendant who was armed with a gun at 2:30 a.m., July 28, 1971. He observed the defendant for about five or ten minutes under a street light and saw his face clearly. He had taken the Chicago Transit train to the terminal at 95th Street and the Dan Ryan Expressway where he got on the 103rd Street bus. He then went home and did not report the robbery to the police but did tell his mother. The following

morning after 2:00 a.m. he saw the defendant at the bus stop at 95th Street and the Dan Ryan Expressway, recognized him and called the policeman who was stationed in the train terminal.

The defendant testified he was playing cards at a friend's house at 39th and Federal at the time Griffin was robbed. At the time he was arrested he was on his way home. It is not clear where he was coming from. He denied robbing Griffin. He lived about two blocks from Griffin.

There is sufficient evidence from which the trial judge could reasonably conclude that the defendant was the man who robbed Griffin and is guilty of the offense as charged, even though the defendant offered an alibi that he spent the night playing cards. People v. Gates, 123 Ill.App.2d 50, 259 N.E.2d 631. The judgment is accordingly affirmed.

This opinion is filed and the case disposed of pursuant to Illinois Supreme Court Rule 23, adopted effective January 31, 1972 (Ill.Rev.Stat. 1971, ch. 110A, 1972 supp. par. 23).

JUDGMENT AFFIRMED.

BURKE, P.J. and GOLDBERG, J. concur.



ABST.

56939

PEOPLE OF THE STATE OF ILLINOIS,)	
ex rel ROBERT LONBERGER,)	
	)	APPEAL FROM THE CIRCUIT
Relator-Appellant,	)	COURT OF COOK COUNTY.
)	
v.)	
)	
RICHARD J. ELROD,	)	HONORABLE JOSEPH A. POWER,
	)	Presiding.
Respondent-Appellee.)	

MR. JUSTICE EGAN delivered the opinion of the court:

The relator-defendant, Robert Lonberger, appeals the dismissal of his petition for writ of habeas corpus. The defendant was charged by indictment with the crime of aggravated battery. On August 25, 1971, the defendant filed a petition for writ of habeas corpus alleging that he had been denied his constitutional right to a speedy trial by the long interval between the date of the offense and his arrest. The public defender was appointed to represent the defendant. Upon motion of the People, the defendant's petition was dismissed. On March 10, 1972, the defendant entered a plea of guilty and was sentenced to a term of two to four years in the Illinois State Penitentiary.

The defendant wished to appeal and the public defender was appointed to represent him. Appointed counsel has now moved for leave to withdraw from the case. Pursuant to Anders v. California, 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396, the motion is supported by a brief. Counsel, in the brief, states in effect that a conscientious examination of the record reveals that an appeal would be frivolous and wholly without merit. A copy of the motion and brief were mailed to the defendant on October 27, 1972, and he was given until December 15, 1972 to submit his comments to this court. No reply has been received.

The present appeal is limited to the dismissal of the habeas corpus petition which argued only the denial of the right to a speedy trial. As pointed out in counsel's brief, habeas corpus is available only where a defendant is in custody under a judgment where the trial court lacked jurisdiction or where something has happened since the defendant's incarceration which would entitle him to relief. Jefferson v. Brantley, 44 Ill.2d 31, 253 N.E.2d 378. Habeas corpus is not available to attack alleged errors of a non-jurisdictional nature. People ex rel Skinner v. Randolph, 35 Ill. 2d 589, 221 N.E.2d 279, People ex rel Rose v. Randolph, 33 Ill. 2d 453, 211 N.E.2d 685. None of the defendant's arguments question the jurisdiction of the court or relate to matters occurring since his detention which would entitle him to relief.

Since we conclude from the brief and from an independent examination of the record in this cause that an appeal would raise no legal points arguable on the merits, we grant counsel's motion to withdraw and affirm the judgment.

MOTION ALLOWED AND
JUDGMENT AFFIRMED.

BURKE, P.J. and GOLDBERG, J. concur.

MAY 1 1973

57396

PEOPLE OF THE STATE OF ILLINOIS,) APPEAL FROM
Plaintiff-Appellee,)
) CIRCUIT COURT,
vs.)
) COOK COUNTY.
LEWIS CAPLES,)
Defendant-Appellant.) HON. JAMES M. BAILEY,
Presiding.

MR. PRESIDING JUSTICE BURKE delivered the opinion of the court:

Lewis Caples, defendant, was charged with the murder of John H. Dampier. Ill.Rev.Stat. 1969, ch. 38, par. 9-1. After a bench trial, he was found guilty of voluntary manslaughter. (Ill.Rev.Stat. 1969, ch. 38, par. 9-2). Judgment was entered and he was sentenced to the Illinois State Penitentiary for not less than five nor more than twelve years. The public defender of Cook County was appointed as defendant's counsel for the purpose of the appeal. On September 13, 1972, he filed, in this court, a motion to withdraw as counsel for appellant on the ground that there are no meritorious issues to be raised on appeal and to appeal would be frivolous. A brief, as required by Anders v. California, 386 U.S. 738, accompanied the motion.

Thereafter, on September 26, 1972, we notified defendant of the pending motion and granted him leave until November 28, 1972 to file any points he might choose in support of his appeal. Defendant has not responded.

The only question discussed in the brief of the public defender is whether the evidence proves the defendant's guilt of voluntary manslaughter beyond a reasonable doubt, and after reviewing the record, he concludes that an appeal would be frivolous, since there is no reasonable doubt as to defendant's guilt; People v. Green, 23 Ill.2d 584, 179 N.E.2d 644; People v. Pena,

72 Ill.App.2d 305, 219 N.E.2d 667; People v. Adams, 113 Ill. App.2d 205, 252 N.E.2d 35, and since there is "clearly sufficient evidence to support a conviction for voluntary manslaughter, under a theory of provocation, People v. Gajda, 87 Ill.App.2d 316, 232 N.E.2d 49; People v. Cooke, 93 Ill.App.2d 376, 236 N.E.2d 97, or reasonable self-defense. People v. Redmen, _____ Ill.App.3d_____, 273 N.E.2d 639."

This court has carefully reviewed all of the evidence adduced at trial and finds it entirely sufficient to have established defendant's guilt of voluntary manslaughter beyond a reasonable doubt.

The brief of the public defender does not discuss the possible prejudicial effect of the trial judge's knowledge, prior to trial, of defendant's past criminal history. The general rule, in a jury trial, has been recently stated in People v. Spencer, 7 Ill.App.3d 1017, 1021, 288 N.E.2d 612, 615:

"The general rule is that evidence of the commission of other crimes by an accused in support of the crime charged is inadmissible, as well as sufficiently prejudicial to constitute reversible error. (People v. Gleason (1962), 36 Ill.App.2d 15, 16, 183 N.E.2d 523, 524)."

However, this was a bench trial. An analogous situation was involved in People v. Hayes, 3 Ill.App.3d 1027, 279 N.E.2d 768, a murder trial by a judge sitting without a jury, where the reviewing court approved of the admission of evidence of a distinct robbery where this evidence proved defendant was at the scene of the crime, adding that a trial judge is presumed to make his findings only upon competent evidence, citing People v. Earl, 34 Ill.2d 11, 213 N.E.2d 556. Earl involved

admissibility of the statements of a co-defendant, not as in the case here which involved evidence of prior convictions. In the case at bar, Caples defense depended entirely on whether the court believed his story. However, a judge, unlike a jury, is not likely to be influenced by knowledge of defendant's previous criminal record. In any event, it does not appear that the error was "of sufficient magnitude to require reversal"; People v. Rivera, 7 Ill.App.3d 983, 289 N.E.2d 36.

Our own examination of the record, as required by Anders v. California, reveals no arguable error. We have concluded, from all the circumstances revealed by the record, that the appeal is frivolous and wholly without merit. The public defender of Cook County is accordingly granted leave to withdraw as counsel for defendant on appeal. The judgment of conviction is affirmed.

MOTION GRANTED and
JUDGMENT AFFIRMED.

GOLDBERG and EGAN, JJ., concur.



ABST.

55562

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
)	
v.	)	COURT OF COOK COUNTY.
)	
THOMAS PIERCE, JR.,	)	Hon. Jack Arnold Welfeld,
	)	Presiding.
Defendant-Appellant.)	

PER CURIAM:

Thomas Pierce, Jr., hereafter called defendant, was charged with contributing to the sexual delinquency of a minor in violation of section 11-5(a)(3) of the Criminal Code. Ill.Rev.Stat. 1969, ch.38, par.11-5(a)(3). After a bench trial the defendant was found guilty and placed on one year's probation with a fine of \$100. The facts as adduced at trial follow.

Tracy O'Mann, age four, testified that on October 28, 1969 in the garage of a restaurant near her home, the defendant pulled down her pants. She had previously known the defendant. Patricia O'Mann, Tracy's mother, testified that Tracy is four years old.

Thomas Pierce, Jr., the defendant, testified that on October 28, 1969, he was not near the garage in question and was home all day except for a short time when he went shopping. Reginald Elliot and Dino Donnato both testified that on October 28, 1969 at the time of the occurrence the defendant was at his home with them.

The defendant on appeal argues several points. For our decision, it is only necessary to consider one issue, whether the competency of Tracy O'Mann was established. Every person of the age of fourteen or over is presumed competent to testify. For a child under the age of fourteen to testify the trial court must first determine whether the child is competent as a witness.

People v. Bridgeforth, 51 Ill.2d 52, 281 N.E.2d 617. The standards to determine competency were set out in People v. Jackson, 3 Ill.App.3d 303, 279 N.E.2d 8:

"Where a witness is under fourteen years of age, the court must conduct an inquiry for the purpose of determining whether the witness is sufficiently mature (1) to receive correct impressions from his senses, (2) to recollect these

impressions, (3) to understand questions and narrate answers intelligently, and (4) to appreciate the moral duty to tell the truth. People v. Armstrong, 127 Ill. App.2d 377, 262 N.E.2d 271."

The determination of the trial court is reviewable but will not be reversed unless there has been an abuse of discretion or manifest misapprehension of principles. People v. Bollinger, 36 Ill.2d 620, 225 N.E.2d 10.

In People v. Sims, 113 Ill.App.2d 58, 251 N.E.2d 795 we considered a case similar to the case at bar. There a thirteen-year-old witness testified on preliminary inquiry that he did not know what would happen if he did not tell the truth or if he told a lie. He could not answer when asked what it meant to tell the truth but stated that he was telling the truth. In reversing the defendant's conviction, we held that the inquiry into the witness' competency was insufficient to qualify him as a witness.

In the case at bar, the examination of Tracy O'Mann represented the same type of abbreviated inquiry as in Sims. The total examination to determine the competency of Tracy O'Mann was as follows:

"Q. Do you want to tell us your name?
A. Tracy.
Q. How old are you?
A. Four.
Q. Do you know what this room is?
A. No.
Q. Do you know what kind of a place this is?
A. Yes.
THE COURT: What kind of a place is it?
THE WITNESS: Police station.
THE COURT: Do you know what I am?
THE WITNESS: A judge.
THE COURT: Do you know what it is to tell the truth?
THE WITNESS: No.
THE COURT: You don't? Do you know what it is to tell a lie?
THE WITNESS: No."

The only other question regarding competency was asked by the defense on cross-examination. Tracy there stated that she was telling the truth. It is our conclusion that the inquiry of Tracy did not meet the established standards for determining

the competency of a child witness.

For the foregoing reasons the judgment of the circuit court is reversed and the cause is remanded for a new trial.

Judgment reversed and remanded.

PER CURIAM

56063

MAY 1973



PEOPLE OF THE STATE OF	)	APPEAL FROM
ILLINOIS,)	
Plaintiff-Appellee,	)	CIRCUIT COURT,
)	
vs.	)	COOK COUNTY.
)	
RODNEY A. MORRIS (Impleaded),	)	HON. EARL E. STRAYHORN,
Defendant-Appellant.	)	Presiding.

MR. PRESIDING JUSTICE BURKE delivered the opinion of the court:

The defendant was found guilty in a bench trial of the crimes of rape and robbery. He was sentenced to not less than five nor more than ten years for rape and not less than two nor more than six years for robbery, the sentences to run concurrently.

He appeals on the grounds that he was not proved guilty of either crime beyond a reasonable doubt, that hearsay testimony was improperly considered and that the sentences meted out were excessive.

On the evening of February 10, 1969, the complaining witness, who was then eighteen years old, was a passenger in a car driven by her mother from Highland, Indiana to Chicago, Illinois. Their destination was the Greyhound bus terminal in downtown Chicago, where they were to pick up a girl friend, a runaway who had called for their help. On the way, they were stopped for a traffic violation. The witness' mother had to go to the police station to post bond, and the witness left the car at 22nd and State Streets to continue alone to the terminal. She tried unsuccessfully to hail a cab, to catch a bus, and to get a lift from some women. Finally, she accepted a ride from two men, one of them the defendant, who had seen her attempts to obtain transportation. She sat between the defendant, who was driving, and his passenger.

Instead of taking her to the terminal, however, the defendant drove to a vacant lot and parked the car. The witness testified that she attempted to escape the car, but that the defendant's passenger restrained her. She also testified that the defendant told her that she would be killed and her body hidden in an abandoned car near where they were parked if she did not submit to their demands. She said that the defendant took her purse from her lap and went into the back seat while the passenger forcibly removed her underpants and raped her.

The complainant then testified that after the passenger had assaulted her, she was forced into the back seat, where the defendant also raped her. She was bleeding after the assaults, and the defendant told her to wipe herself with a rag found in the car. She dressed herself and re-entered the front seat, where she was shown a gun in the glove compartment. She was threatened with death if she reported the incident. She testified that the defendant and his passenger then drove her downtown and released her at the bus terminal.

At the terminal the witness had her mother and the girl friend paged. A security guard approached her and she told him that she had been raped by two men who had a gun. The guard summoned the Chicago police, and the policeman who arrived had the witness taken to the hospital for treatment. At the hospital she described her assailants. After treatment she returned to Indiana.

Several days later, the complainant returned to Chicago and with policemen retraced the route taken by the defendant. She found and identified the vacant lot where she was assaulted.

thirteen years of age with a female not his wife by force and against her will. (Ill.Rev.Stat., 1967, ch. 38, par. 11-1.)

Rape is a crime that is difficult to prove and even more difficult to defend against. Hence, the testimony of the complaining witness must be clear and convincing or supported by other facts and circumstances. (People v. Kepler, 76 Ill.App.2d 135, 221 N.E.2d 801.) This court will not, however, substitute its judgment for that of the trial judge, who had an opportunity to see the witnesses and hear their testimony, unless the judgment is so unsatisfactory as to justify a reasonable doubt of the defendant's guilt. (People v. Marose, 10 Ill.2d 340, 139 N.E.2d 735.) The record in this case raises no such doubt.

The defendant admitted that he picked the witness up and agreed to help her reach her destination. He also admitted that he drove instead to a vacant lot and that his passenger had intercourse with the witness. He admitted taking money from her purse. His self-serving statement that he refrained from having intercourse after he thought she was menstruating was to be considered by the trial judge. This and other conflicts in the evidence were to be resolved by the trier of fact and do not alone justify reversal of the judgment. People v. Marose, 10 Ill.2d 340, 139 N.E.2d 735.

An examination of defendant's argument that the evidence indicates the witness consented to have intercourse produces the same conclusion. The defendant's contention that the testimony of the complainant is not credible must be weighed against the version of the facts that he contends is credible. He asks us, as he did the trial court, to believe that the witness, relatively unfamiliar with the City of Chicago, left her mother's car to hurry to the

terminal, searched frantically for transportation and then postponed her mission in order to have intercourse with two complete strangers.

As evidence of the witness' consent, the defendant cites her failure to attempt escape from the car until they reached the vacant lot. We think the facts that she was not familiar with the city, and that she believed she was being taken to the bus terminal explain her complacency.

Further, the defendant argues as indicating the witness' consent that there were no marks of force on her or her clothing. But it is well-settled in Illinois that a victim need not resist where resistance would be futile and would endanger her life, or where she is overcome by superior strength. (People v. Smith, 32 Ill.2d 88, 203 N.E.2d 879.) The witness in this case was between the driver and his passenger in the car and was apparently unaware of her peril until the car was near the vacant lot. When cognizant of her situation, she testified that she resisted by twisting away from the passenger's advances. She was, however, threatened with death if she continued to resist. The trial court's finding of forcible rape is supported by the evidence.

The defendant next contends that the acquittal of his co-defendant should have resulted in his own acquittal, since it raised a reasonable doubt as to his guilt. But the cases cited by the defendant are distinguishable from the instant case. In one, the testimony of two witnesses had to be believed to convict the defendant and not believed to acquit his co-defendant. Hence, the reviewing court held that the acquittal cast a reasonable doubt on the defendant's guilt. (People v. Ethridge, 131 Ill.App.2d 351, 268 N.E.2d 260.) In the other case cited, the

court concluded that no reasonable reconstruction of the State's case would support a conviction of one defendant and the acquittal of another defendant. (People v. Griffin, 88 Ill.App.2d 28, 232 N.E.2d 216.) Only the defendant's testimony in this case contradicts the complainant's. And the defendant himself offered a plausible reconstruction of the State's case in naming his passenger on the night of the incident.

Having sustained the conviction for forcible rape, we also find that the defendant's conviction for robbery must stand. Robbery is defined as the taking of property from the person or presence of another by the use of force or by threatening the imminent use of force. (Ill.Rev.Stat., 1967, ch. 38, par.18-1.) The defendant admitted the taking of money from the witness' purse while in her presence. The only question concerns the use of force in the taking. We resolve this question in favor of the State. We cannot say that the defendant Morris was not proved guilty beyond a reasonable doubt.

The defendant claims that he was prejudiced by the admission of certain hearsay testimony. Specifically, the defendant cites testimony of two police officers regarding conversations had with the complainant. We find, however, that even if the conversations do not qualify for the exception from hearsay testimony for spontaneous utterances, there is no evidence that the trial judge relied on them in reaching his verdict. Absent such reliance, we cannot say that the defendant's case was prejudiced by the admission of the testimony. People v. House, 69 Ill.App.2d 324, 217 N.E.2d 566.

The defendant's final contention is that the sentences were excessive. In support of this claim, he states that he had no

prior criminal record, the victim in this case was not beaten, and the victim was in part responsible for the crimes because of her provocative behavior. We cannot agree. The victim's conduct, while imprudent, was not shown to be an invitation. And the sentences are within the statutory ranges of four to any number of years for rape and one to twenty years for robbery. (Ill.Rev.Stat., 1967, ch. 38, par. 11-1 and par. 12-1, respectively.) The defendant also argues that the chance of his rehabilitation will be thwarted by the length of the sentences imposed. That the minimum sentences were not given does not require reversal by this court. (People v. Svoboda, ____Ill.App.____, 268 N.E.2d 471.) We find that the sentences imposed were within the discretion of the trial judge.

The judgment is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG and EGAN, JJ., concur.

56313

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
DELIA HAEFFELE,	)	Hon. Philip Romiti,
	)	Presiding.
Defendant-Appellant.)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

On September 8, 1965, defendant pled guilty to two separate indictments, each charging theft. She was placed on probation for five years. On March 7, 1969, she pled guilty to a third indictment charging theft and was again placed on probation for five years. On June 30, 1970, a rule to show cause why probation should not be terminated was entered. On February 26, 1971 and March 1, 1971, hearings were held on the rule. The court terminated each of the defendant's probations; and, after a hearing in aggravation and mitigation, sentenced her to three concurrent terms of four to ten years in the State Reformatory. She appeals.

At the hearing on the rule to show cause, it was stipulated that testimony would show that defendant was hired as a bookkeeper and accountant commencing April 1, 1969. This was slightly less than one month before her second period of probation commenced. Her duties were to draw checks on the general account of the firm but she was not authorized to sign them. On November 17, 1969, she was authorized to sign checks drawn on the payroll account. During the course of her employment, defendant raised and altered checks payable to herself in the amount of \$17,414.88. The defendant's actual earnings during her employment were \$3,814.88. In addition she forged other checks totaling \$44,683.97.

It was also stipulated that testimony would show that the defendant, Mrs. Delia Haeffele, also known as Mrs. Eugene Wiszowaty and Delia Wiszowaty, had two accounts in a Michigan bank. During the period in question, checks from defendant's employer were deposited in this bank by her, totaling \$42,524. Also a check for \$2195 was cashed. It was stipulated that, during the period in question, defendant deposited raised checks from her employer in the amount of \$9804.55 in her account at the First National Bank of Chicago Heights.

Based upon the above stipulated testimony, the trial judge found the defendant in violation of her probation. A hearing in aggravation and mitigation disclosed the following facts. The defendant had been ordered to make restitution under her probations. She made restitution of only \$2215 under an order for \$4244; only \$1133.79 under an order for \$2189.32; being a total of \$3084.53 under above orders for a total of \$6433.32. In December of 1965, a warrant was issued for her arrest for failure to report to her probation officer. Further, still another former employer of defendant testified that he had discovered shortages of about \$26,000. When confronted with this, defendant gave a written statement admitting the theft. This was the basis for her third indictment and additional probation. She repaid only \$2950 of the funds thus stolen. In addition, in 1970, defendant, by altering checks improperly, obtained approximately \$20,000 from yet another company where she had been employed.

The defendant on appeal seeks only a reduction in sentence on the theory that her sentence was designed to punish her for acts committed during the period of probation as well as for her original crime. (Ill.Rev.Stat. 1971, ch.38, par.117-2(d).)

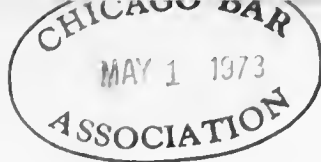
She bases this argument on the testimony heard at the hearing in aggravation and mitigation and the trial judge's statement that, in view of all of the defendant's actions, he did not feel that the State's recommendation of a penitentiary sentence of five to 10 years was unreasonable. The trial court stated that defendant wilfully ignored her probation and he referred to her "course of conduct."

We have examined the entire record with special attention to the remarks by the trial judge. We conclude that the sentence was properly imposed and that it related directly to the original offense. It was not a sentence for "***possible crime committed after probation." (People v. Turner, 129 Ill.App.2d 24, 26, 262 N.E.2d 379.) If any of the matters brought out on the hearing in aggravation and mitigation were improper, we would presume that the trial court would disregard them. People v. Bey, 51 Ill.2d 262, 267, 281 N.E.2d 638.

We have often stated the rule that a trial judge is in a far superior position than this court to determine a proper sentence and his decision should not be disturbed unless it represents a departure from the spirit and basic purpose of the law. (People v. Taylor, 33 Ill.2d 417, 424, 211 N.E.2d 673; People v. Williams, 3 Ill.App.3d 1, 279 N.E.2d 100.) This defendant was given repeated consideration on several occasions, yet, by her own conduct, she gave the court no alternative other than imposition of sentence. The sentence is within the limits prescribed by statute and a review of the record demonstrates that it was fair and proper.

Judgment affirmed.

BURKE, P.J., and EGAN, J., concur.



ABST.

Jan 23/73

NO. 55787

91A.3 989

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY
)	
vs.)	
)	
ALLEN JACKSON,	)	HONORABLE
	)	FRANK J. WILSON,
Defendant-Appellant.	)	PRESIDING.

MR. JUSTICE LEIGHTON delivered the opinion of the court:

Defendant, charged with murder, pleaded guilty to voluntary manslaughter and was sentenced to serve 2 to 15 years. The only issue in this appeal is whether he was denied due process of law when his guilty plea was accepted without admonition that he was waiving his fifth amendment right against self-incrimination and his sixth amendment right to confront his accusers.

In the October Term 1968, the United States Supreme Court held that the record of a State guilty plea conviction must affirmatively disclose that the defendant entered his plea understandingly and voluntarily. (Boykin v. Alabama (1969), 395 U.S. 238, 25 L. Ed. 2d 747, 90 S. Ct. 1463.) On June 16, 1970, defendant, represented by counsel of his choice, appeared in the trial court, engaged in a plea bargain, moved to withdraw his not guilty plea to murder and pleaded guilty to the lesser included offense of voluntary manslaughter. As required by law, he was admonished on the consequences of his plea. Defendant was told that by pleading guilty he was waiving the right to a trial by court or jury but he was not told that his plea waived his right against self-incrimination and his right to confront his accusers. Then on September 1, 1970, Supreme Court Rule 402(a)(4) became effective. Arguing the issue presented, defendant contends that the trial court erred in failing to admonish him that his plea of guilty waived his right of confrontation and his privilege against self-incrimination. He argues that the judgment entered on his

guilty plea must be reversed.

We reject both the contention and the argument. Supreme Court Rule 402(a)(4) does not have retroactive application. (People v. Nelson, 47 Ill. 2d 570, 572, 268 N.E. 2d 2; People v. Nardi, 48 Ill. 2d 111, 116, 268 N.E. 2d 389; People v. Cook, 1 Ill. App. 3d 292, 295, 274 N.E. 2d 209.) Defendant's case is controlled by Boykin. (People v. Williams, 44 Ill. 2d 334, 343, 255 N.E. 2d 385.) Boykin did not alter or modify the constitutional standards by which the validity of a plea of guilty in a court of this State is to be determined. Federally, the constitutional requirement, both pre and post Boykin, is that a plea of guilty be "intelligent and voluntary." A plea of guilty may be intelligent and voluntary, even though the defendant is not specifically admonished concerning every consequence of his plea. (People v. Mendoza, 48 Ill. 2d 371, 373, 270 N.E. 2d 30.) This has been the consistent holding of reviewing courts of this State. See People v. Cotton, 3 Ill. App. 3d 706, 279 N.E. 2d 62; People v. Miller, 3 Ill. App. 3d 712, 279 N.E. 2d 64; People v. Walsh, 3 Ill. App. 3d 1042, 279 N.E. 2d 739; People v. Gersbacher, 4 Ill. App. 3d 921, 282 N.E. 2d 238. We conclude, therefore, that defendant was not denied due process of law when the trial court accepted his guilty plea without admonition that he was waiving his fifth amendment right against self-incrimination and his sixth amendment right to confront his accusers. The judgment is affirmed.

Affirmed.

Stamos, P.J. and Hayes, J., Concur.

Publish abstract only.



ABST.

56929

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
) Appeal from the Circuit
)
v.) Court of Cook County.
)
)
LOUIS BUCKNER and CLIFTON BAGEON)
(Impleaded),) Saul A. Epton, J.
)
Defendants-Appellants.)

PER CURIAM:

Defendants Louis Buckner and Clifton Bageon were indicted with Robert Talbert for the crime of burglary, in violation of section 19-1 of the Criminal Code. (Ill.Rev.Stat., 1969, ch. 38, para. 19-1.) They were found guilty by a jury, and Buckner and Bageon were each sentenced to terms of one year to eight years in the penitentiary; Talbert was placed on probation for a period of five years, the first five months to be served in the county jail, on further condition that he abide by the rules of the Drug Abuse Program. Defendants Buckner and Bageon alone appealed, contending that certain comments by the prosecutor during the State's final summation to the jury violated their constitutional right to remain silent and deprived them of a fair and impartial trial.

On March 30, 1971, police officers, acting in response to a radio communication of a burglary in progress, apprehended the

defendants and Talbert in a home belonging to Mrs. Irene Shelton. The rear door to the premises had been forced open, the personal property inside the house was in disarray, and items of personal property were stacked near the forced door. Defendants were unable to give satisfactory reason for their presence on the premises and were placed under arrest. Coins and currency were recovered on the person of defendant Buckner which were identified by the house owner's fourteen year old son as part of his coin collection. Defendant Bageon's version of the incident was that he was near the house, the owner of which he knew for some time, when he heard shouts that the house was being burglarized; he and his co-defendant entered the house to investigate and were later placed under arrest.

During final summation to the jury, the prosecutor commented that "the defendant Bageon and his companions, Talbert and Buckner, refused to make any other statements concerning the burglary" to the police. The trial court did not rule on defense counsel's objection to that statement. The prosecutor also referred to them as "punks," "a dirty rotten burglar," "as low as a snake," and as a person who "if you feed him, he'll turn around and bite the hand that feeds him." Defendants contend that the former statement violated their constitutional right to remain silent, and that the latter characterizations deprived them of a fair and impartial trial.

While the defendants' first contention does, at first blush, seem to have merit, a review of the record shows that the question of the defendants' failure to render statements concerning the burglary was initiated by defense counsel at trial, thereby obviating that contention. On recross-examination of one of the arresting officers, on cross-examination of one of the investigating officers, and finally on defendants' closing argument that matter was gone into. A review of the transcript further reveals that the prosecutor did not broach that matter either during the examination of the witnesses or during his initial summation to the jury. Consequently, since it has long been established in this State that evidence adduced at trial may properly be commented on during summation, there appears to have been no error in the court's failure to sustain defense counsel's objection to the prosecutor's comment on final summation, that defendants did not make statements to the officers after their arrest. See People v. Smothers, 2 Ill.App.3d 513, 276 N.E.2d 427; People v. Johnson, 2 Ill.App.3d 53, 276 N.E.2d 107.

The cases cited by defendants are inapplicable to the instant situation: Miranda v. Arizona, 384 U.S. 436; Griffin v. California, 380 U.S. 609; Chapman v. California, 386 U.S. 18, and People v. Rothe, 358 Ill. 52, 192 N.E.2d 777.

With regard to defendants' second contention, that of the prosecutor's characterizations of them during summation, the

People state in their brief that, "to some measure at least," the argument of counsel may have exceeded the limits of proper argument. However, it is well settled that comments and arguments of prosecution during summation will warrant reversal of a conviction only where it reasonably appears that the verdict of the jury would have been different had those statements not been made. People v. Trice, 127 Ill.App.2d 310, 262 N.E.2d 276.

In light of the overwhelming evidence of defendants' guilt adduced by the State and the rather incredible version of the circumstances given in defense, it clearly appears that the jury's verdict would not have been different had those characterizations of defendants not been made.

Finally, a passing comment by the defendants in their brief, that the prosecutor implored the jury to convict the defendants because they chose "to exercise their right to a trial," finds no support in this record.

The cases cited by the defendants are not in point. See e.g., People v. Payton, 72 Ill.App.2d 240, 218 N.E.2d 518; People v. Dukes, 12 Ill.2d 334, 146 N.E.2d 14; People v. Rosochacki, 41 Ill.2d 483, 244 N.E.2d 136; People v. Vasquez, Ill.App.3d , N.E.2d (#55995, First District, November 15, 1972).

For these reasons the judgments appealed from are affirmed.

Judgments affirmed.

MAY 1 1971

No. 57349

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
vs.)	
)	
PEDRO PINEDA,	)	HONORABLE
	)	EUGENE WACHOWSKI,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM (First District, Third Division):

The petitioner, Pedro Pineda, was indicted for two separate charges of rape and one charge of burglary. Initially the petitioner pleaded not guilty. On December 20, 1965, the petitioner withdrew his not guilty pleas and entered pleas of guilty to all the charges. He was sentenced to the Illinois State Penitentiary for two terms of not less than eight nor more than thirty years and one term of not less than one nor more than ten years, all concurrent.

On February 26, 1970, the defendant filed a pro se post-conviction petition alleging, among other things, that he was induced to plead guilty by the representation of his attorney that he would receive a sentence of eight to twenty years. The petition, although sworn to, was unsupported by any affidavit. Upon motion of the People, the trial court dismissed the petition without an evidentiary hearing. The defendant appeals that dismissal.

On this appeal, petitioner argues that his verified petition alleging an unfulfilled promise of a lower sentence requires an evidentiary hearing. The petitioner also argues that the post-conviction judge should have disqualified himself. The allegations of the defendant's post-conviction petition relative to his argument of an unfulfilled promise of a lesser sentence state:

9. One day in Oct. petitioner's lawyer told petitioner that the Judge and State's Attorney would let petitioner Plead Guilty for 8 to 30;



10. Then in December, petitioner's lawyer told petitioner the Judge and State's Attorney will now let you Plead Guilty to 8 to 20;
11. Later, your petitioner said, I will plead guilty for a sentence of 8 to 20, and then, petitioner called his parents on the phone and was told that his Mother would be in court when he was to plead guilty;
12. Petitioner entered a Plea of Guilty on December 20, 1965. Petitioner had a 7th grade education, was 18 years old; Petitioner could barely understand nor speak English, and, petitioner's Mother understood nor spoke English, but the Judge did not get an interpreter. [sic]
13. The Court sentenced petitioner to two 8 to 30 sentences and one one to ten sentence, all sentences running concurrently with each other; At the Cour's [sic] sentence petitioner said "I want to take back my Plea of Guilty", and the Court said, that that was not possible, then petitioner's lawyer said, "I object to this break of trust by the State's Attorney", then the Court replied, "I did not know anything about this deal;".

In People v. Gaines, 48 Ill.2d 191, 268 N.E.2d 426, the defendant appealed the dismissal of his post-conviction petition without a hearing, arguing that he was entitled to a hearing on the allegation that his plea of guilty was induced by his attorney's representation that he would receive a sentence lower than the sentence he actually received. The court distinguished People v. Williams, 47 Ill.2d 1, 264 N.E.2d 697, People v. Washington, 38 Ill.2d 446, 232 N.E.2d 738, and People v. Sigafus, 39 Ill.2d 68, 233 N.E.2d 386, all of which are cited by the defendant in the instant case, in that those cases presented an allegation which was not contradicted by the record. In Gaines, the record itself contradicted the defendant's allegation. During the hearing in aggravation and mitigation, the defendant stated that no promises were made to him. The defendant did not object to the sentence, made no motion to withdraw his plea and did not file his post-conviction petition for five years.

In the case at bar, the record clearly contradicts the allegations of the petitioner's petition. The petitioner alleges that he can barely understand or speak English. The transcript



of the defendant's guilty plea demonstrates that the defendant understood and clearly answered each question asked and further engaged in an exchange with the trial judge as to which of the stipulated facts were true. The defendant alleges that at his change of plea he said, "I want to take back my Plea of Guilty." The transcript shows that no such statement was ever made. The defendant alleges that at his change of plea his attorney said, "I object to this break of trust by the state's attorney." The transcript shows that no such statement was ever made. Upon the defendant's plea of guilty to the first indictment he was sentenced to a term of eight to thirty years. The defendant demonstrated no surprise and thereafter entered pleas of guilty to two other indictments receiving concurrent sentences. The defendant made no motion to withdraw his plea and did not attempt to appeal his conviction or file a post-conviction petition for over four years. Under the facts of this case, the trial court did not err in dismissing the petition without an evidentiary hearing. People v. Spicer, 47 Ill.2d 114, 264 N.E.2d 181.

The petitioner's second contention is that the cause should have been transferred to another judge for a hearing since the post-conviction judge had knowledge of matters outside the record. The petitioner relies upon People v. Washington, 38 Ill.2d 446, 232 N.E.2d 738. There the court held that a hearing was required on the defendant's allegations of an unfulfilled promise and the case should therefore be transferred to another judge. In the case at bar, we have determined that no hearing was required. The trial judge therefore had no reason to disqualify himself. Further, the petitioner's post-conviction petition itself alleges that the trial judge at the plea of guilty stated he had no knowledge of any deal. If the trial judge had no knowledge of matters outside the record, he had no reason to disqualify himself. People v. Williams, 47 Ill.2d 1, 264 N.E. 2d 697.



For the above reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Per curiam.



No. 57349

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
vs.)	
)	
PEDRO PINEDA,	)	HONORABLE
	)	EUGENE WACHOWSKI,
Defendant-Appellant.	)	PRESIDING.

PER CURIAM (First District, Third Division):

The petitioner, Pedro Pineda, was indicted for two separate charges of rape and one charge of burglary. Initially the petitioner pleaded not guilty. On December 20, 1965, the petitioner withdrew his not guilty pleas and entered pleas of guilty to all the charges. He was sentenced to the Illinois State Penitentiary for two terms of not less than eight nor more than thirty years and one term of not less than one nor more than ten years, all concurrent.

On February 26, 1970, the defendant filed a pro se post-conviction petition alleging, among other things, that he was induced to plead guilty by the representation of his attorney that he would receive a sentence of eight to twenty years. The petition, although sworn to, was unsupported by any affidavit. Upon motion of the People, the trial court dismissed the petition without an evidentiary hearing. The defendant appeals that dismissal.

On this appeal, petitioner argues that his verified petition alleging an unfulfilled promise of a lower sentence requires an evidentiary hearing. The petitioner also argues that the post-conviction judge should have disqualified himself. The allegations of the defendant's post-conviction petition relative to his argument of an unfulfilled promise of a lesser sentence state:

9. One day in Oct. petitioner's lawyer told petitioner that the Judge and State's Attorney would let petitioner Plead Guilty for 3 to 30;

10. Then in December, petitioner's lawyer told petitioner the Judge and State's Attorney will now let you Plead Guilty to 8 to 20;
11. Later, your petitioner said, I will plead guilty for a sentence of 8 to 20, and then, petitioner called his parents on the phone and was told that his Mother would be in court when he was to plead guilty;
12. Petitioner entered a Plea of Guilty on December 20, 1965. Petitioner had a 7th grade education, was 18 years old; Petitioner could barely understand nor speak English, and, petitioner's Mother understood nor spoke English, but the Judge did not get an interpreter. [sic]
13. The Court sentenced petitioner to two 8 to 30 sentences and one one to ten sentence, all sentences running concurrently with each other; At the Court's [sic] sentence petitioner said "I want to take back my Plea of Guilty", and the Court said, that that was not possible, then petitioner's lawyer said, "I object to this break of trust by the State's Attorney", then the Court replied, "I did not know anything about this deal;".

In People v. Gaines, 48 Ill.2d 191, 268 N.E.2d 426, the defendant appealed the dismissal of his post-conviction petition without a hearing, arguing that he was entitled to a hearing on the allegation that his plea of guilty was induced by his attorney's representation that he would receive a sentence lower than the sentence he actually received. The court distinguished People v. Williams, 47 Ill.2d 1, 264 N.E.2d 697, People v. Washington, 38 Ill.2d 446, 232 N.E.2d 738, and People v. Sigafus, 39 Ill.2d 68, 233 N.E.2d 386, all of which are cited by the defendant in the instant case, in that those cases presented an allegation which was not contradicted by the record. In Gaines, the record itself contradicted the defendant's allegation. During the hearing in aggravation and mitigation, the defendant stated that no promises were made to him. The defendant did not object to the sentence, made no motion to withdraw his plea and did not file his post-conviction petition for five years.

In the case at bar, the record clearly contradicts the allegations of the petitioner's petition. The petitioner alleges that he can barely understand or speak English. The transcript

of the defendant's guilty plea demonstrates that the defendant understood and clearly answered each question asked and further engaged in an exchange with the trial judge as to which of the stipulated facts were true. The defendant alleges that at his change of plea he said, "I want to take back my Plea of Guilty." The transcript shows that no such statement was ever made. The defendant alleges that at his change of plea his attorney said, "I object to this break of trust by the state's attorney." The transcript shows that no such statement was ever made. Upon the defendant's plea of guilty to the first indictment he was sentenced to a term of eight to thirty years. The defendant demonstrated no surprise and thereafter entered pleas of guilty to two other indictments receiving concurrent sentences. The defendant made no motion to withdraw his plea and did not attempt to appeal his conviction or file a post-conviction petition for over four years. Under the facts of this case, the trial court did not err in dismissing the petition without an evidentiary hearing. People v. Spicer, 47 Ill.2d 114, 264 N.E.2d 181.

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For the above reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Per curiam.



MAR 1 1973

No. 56008

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY
)	
vs.)	
)	
OZIE L. JACKSON and JOHNNIE WILKREN)	)	HONORABLE
(Impleaded),	)	SAUL A. EPTON,
	)	PRESIDING.
Defendants-Appellants.))	

PER CURIAM (FIFTH DIVISION, FIRST DISTRICT):

Defendants Jackson and Wilkren were indicted with Donald Johnson for the crime of armed robbery, in violation of section 12-2 of the Criminal Code. (Ill. Rev. Stat. 1969, ch. 38, par. 12-2.) They waived a trial by jury, were found guilty by the court, and Jackson was sentenced to a term of two to six years and Wilkren to a term of five years to fifteen years. Defendants appeal. (The record is silent as to the disposition of the matter against Donald Johnson.)

Robert Wojtasik testified that at about 7:50 P.M. on August 8, 1970, he was seated on a bench in Lincoln Park in Chicago when two male Negroes seated themselves on either side of him. While the man on his right asked the witness if he wished to purchase some pills, a third man approached from the rear, placed a knife to the witness' throat and demanded money; the third man then reached into the witness' pocket and removed a five dollar bill. The witness stated that the two men who were seated beside him arose and joined the third man, that the witness arose, turned and faced the three men, that he then observed the face of the third man, and that he was warned by them not to inform the police. The three men then began to walk toward a pedestrian overpass leading from the park to the North Avenue Beach; the witness testified that he observed their progress as they proceeded to the overpass.

When the three men were about a half block from the overpass and about 1,000 feet from the witness, a police officer arrived on a

three-wheeled motorcycle and was informed by the witness of what had occurred, and the witness pointed to the three men. The witness testified that he told the officer that two of the men were bearded and that the third wore a mustache, but no beard. The officer then gave chase.

Chicago Police Officer William Warshauer testified that he held a short conversation with Wojtasik on the date and at the time in question and that Wojtasik told him that he had been robbed by three men whom Wojtasik pointed to and who, at that time, were running toward the overpass ramp. He testified that the only description Wojtasik gave him was that one of the assailants was wearing a black T-shirt. The witness then gave chase and kept the three men in sight until he placed them under arrest on the lake side of the ramp. Although defense counsel tried to impeach the officer by using his previous sworn statement that the man in the black T-shirt threw the knife away, the officer testified that he heard the knife fall to the ground. A small pocket knife was found on the ground, about three feet below where the men were standing on the ramp when arrested, which knife was identified at trial by Wojtasik as looking like the knife used by his assailants.

Chicago Police Officers Maturo and Offerman both testified that they were patrolling the North Avenue Beach area at the time in question and that they assisted Officer Warshauer in the arrest of three men. Both officers testified to the presence of the knife near the place where the men were standing when arrested.

Wojtasik identified defendants at trial as two of the three men who robbed him, and all the police officers identified them as two of the three men who were arrested on the day in question.

Defendants offered no evidence in their behalf.

Defendants initially contend that they were not proven guilty beyond a reasonable doubt in that the identification testimony was weak and that there was no corroboratory evidence that they were the assailants. In support of their contention, defendants cite four



cases regarding discrepancies in the description of the assailant's height and facial features. (People v. Cullotta (1965), 32 Ill.2d 502, 207 N.E.2d 444; People v. Martin (1968), 95 Ill.App.2d 457, 238 N.E.2d 205; People v. Marshall (1966), 74 Ill.App.2d 483, 221 N.E.2d 133; People v. Kincy (1966), 72 Ill.App.2d 419, 219 N.E.2d 622.) However, these cases are distinguishable on their facts from the instant case.

The sufficiency of an identification raises a question of credibility, which is a matter for determination by the trier of fact, and that determination will not be disturbed on review unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt as to guilt. (People v. Cooper (1971), ____ Ill.App.2d ____, 270 N.E.2d 447.) In the instant case, Wojtasik's description of the defendants' clothing or how the officer came upon the knife in question and the like are at best minor discrepancies in the testimony and go only to the weight to be accorded thereto and do not destroy credibility. People v. Staples (1971), 1 Ill.App.3d 922, 275 N.E.2d 259. The foregoing summary of the evidence reveals that there was sufficient, competent evidence adduced at trial from which, if believed, the trier of fact could find defendants guilty of armed robbery beyond a reasonable doubt.

The defendants also argue that the trial court erred in imposing sentences consisting of longer terms than had been discussed in the pre-trial plea bargaining negotiations. They maintain that the lengthier sentences constituted a punishment for the exercise of their right to trial. Defendants do not request a reduction of their sentences in this regard, but rather ask for outright reversal of their convictions because of the "manifest injuries" accruing to them for the exercise of their right to a trial.

Where it is claimed that a sentence is imposed as a punishment for an accused invoking his right to a trial, such must be clearly established by the evidence. For example, where a co-defendant who has pleaded guilty receives a lesser sentence, this factor will

not necessarily support an inference that the heavier sentence imposed upon the other co-defendant after a trial was imposed as punishment for demanding trial. People v. Perry (1971), 47 Ill.2d 402, 266 N.E.2d 330; People v. Capon (1961), 23 Ill.2d 254, 178 N.E.2d 296.

In the instant case, the record reveals that the sentences imposed upon defendants were so imposed because of defendants' criminal records (Jackson's including three prior felony convictions) and due to the nature of the crime here involved. There is no evidence that they were imposed as punishment for demanding a trial.

The case of People v. Smith (1971), ____ Ill.App.2d ____, 271 N.E.2d 61, cited by defendants, is not on point.

The judgments are affirmed.

Judgments affirmed.



MAR 1 1971

No. 56008

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY
)	
vs.)	
)	
OZIE L. JACKSON and JOHNNIE WILKREN))	HONORABLE
(Impleaded),)	SAUL A. EPTON,
)	PRESIDING.
Defendants-Appellants.))	

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three-wheeled motorcycle and was informed by the witness of what had occurred, and the witness pointed to the three men. The witness testified that he told the officer that two of the men were bearded and that the third wore a mustache, but no beard. The officer then gave chase.

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not necessarily support an inference that the heavier sentence imposed upon the other co-defendant after a trial was imposed as punishment for demanding trial. People v. Perry (1971), 47 Ill.2d 402, 266 N.E.2d 330; People v. Capon (1961), 23 Ill.2d 254, 178 N.E.2d 296.

In the instant case, the record reveals that the sentences imposed upon defendants were so imposed because of defendants' criminal records (Jackson's including three prior felony convictions) and due to the nature of the crime here involved. There is no evidence that they were imposed as punishment for demanding a trial.

The case of People v. Smith (1971), ____ Ill.App.2d ____, 271 N.E.2d 61, cited by defendants, is not on point.

The judgments are affirmed.

Judgments affirmed.





ABST.

55641

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
L. T. VAN,)	
	)	Hon. Kenneth R. Wendt,
Defendant-Appellant.	)	Presiding.

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

L. T. Van (defendant) was indicted for arson (Ill.Rev. Stat. 1967, ch.38, par.20-1) and criminal damage to property (Ill.Rev.Stat. 1967, ch.38, par.21-1.) After a jury trial, he was found guilty of arson and sentenced to two to six years in the penitentiary. He appeals.

A special police officer testified for the State. He was driving and stopped in traffic near a two-flat building at 3828 West Jackson Boulevard, in Chicago, when he saw a man crouched in a doorway. The man then pushed the door open, threw something in, a flame came out and the man fled. The witness apprehended the man, identified as the defendant, and turned him over to the police. Another police officer testified that when defendant was arrested his eyelashes and eyebrows were burned and the left side of his hair was singed.

The state also produced several witnesses who testified that defendant often visited Lulu Edwards, who lived in the building. Several witnesses also testified to hearing the defendant admit starting the fire, but no mention of these admissions was made in any police report.

The defendant testified that he had not started the fire and that he had never admitted starting the fire. Defendant



also testified that he came to the apartment building and found it burning. He then started running to a nearby telephone to call the fire department. He was stopped by the special officer who assaulted and struck him. The defense also called a character witness who had worked at a tavern with the defendant for six years. He testified to defendant's good reputation for peacefulness and honesty. Another character witness described defendant as a very mild mannered man.

Defendant contends that the trial court's failure to institute, sua sponte, a competency hearing constituted reversible error; the prosecutor's misconduct deprived him of a fair trial; and the prosecutor's closing argument was improper, inflammatory and prejudicial and went beyond the scope of the evidence, prejudicing the jury.

We will consider first the question of the alleged need for the trial judge to institute a competency hearing for defendant sua sponte. Before trial had commenced, on motion of defendant's attorney, defendant was sent to the Behavior Clinic for a psychiatric examination. Such an examination was conducted and a report was filed with the court. The report noted that defendant had previously had psychiatric treatment. However, the report concluded that defendant "knows the nature of the charge and is able to cooperate with his counsel." Defendant now urges that as the cause progressed it appeared that he had spent two months in a hospital for a concussion and thereafter he had been hospitalized for two weeks for a nervous breakdown. He also testified that he had another nervous breakdown after the date of the fire in question. Defendant also directs our attention to the statement of the trial court at the time of sentencing to the effect that he thought the defendant was "sick."



In this type of situation, the issue is whether the facts which occurred at trial gave the court sufficient "****reason to believe that the defendant****" was incompetent. (Ill.Rev.Stat. 1971, ch.38, par.104-2.) Our Supreme Court has consistently held that this question is largely within the discretion of the trial judge. (People v. Southwood, 49 Ill.2d 228, 230, 274 N.E.2d 41.) In many cases, some confusion may arise during trial because of statements made by defendant, but whether the record in any particular case is sufficient to require a competency hearing remains a matter within the discretion of the trial judge. People v. Franklin, 48 Ill.2d 254, 258, 269 N.E.2d 479.

In the case at bar, we do not find any abuse of discretion on the part of the trial court. We regard the remarks of the judge at sentencing as descriptive of the nature of the crime committed more than as an allusion to the defendant's competency. We find no error in this regard.

Defendant next urges error in cross-examination by the prosecutor. Defendant called a character witness who had worked with him at a tavern for six years. As above shown, the testimony of this witness was limited to the defendant's reputation for peacefulness and honesty. Under these circumstances, it was the duty of the prosecutor to limit his cross-examination to the scope of the direct examination and to matters affecting the credibility of the witness. Instead, the following ensued:

"Q. Have there been any fires at the tavern?

A. Yes."

We believe that the contention of defendant that the asking of this question was prejudicial and reversible error must

be upheld. This is not a case in which the evidence is so overwhelming in proof of guilt beyond a reasonable doubt that we can state with assurance that the verdict would not have been different if this prejudicial incident had not occurred. If so, we would be able to characterize this incident as harmless error. (People v. Brown, 51 Ill.2d 271, 273, 281 N.E.2d 682.) On the contrary, in the case at bar, there is a definite conflict in the evidence regarding guilt and it was the duty of the trier of fact to determine where the balance of credibility was. In a situation of this kind, where the evidence is close and conflicting, this court will give careful consideration to trial errors even though, as here, no objection was made to the offending question. (People v. Weinstein, 35 Ill.2d 467, 471, 220 N.E.2d 432; People v. Bell, 61 Ill.App. 2d 224, 237, 209 N.E.2d 366.) We find here that the record presents plain error which caused a substantial miscarriage of justice. Supreme Court Rule 615(a), 50 Ill.2d R.615(a).

Reflection upon the character of this single question convinces beyond doubt of its prejudicial nature which effectively destroyed defendant's right to a fair trial. In effect, this question amounted to an insinuation obtained by the prosecutor from defendant's own character witness that defendant was connected with the outbreak of fires even at his place of employment. It is elementary that evidence tending to show that the accused has committed crimes independent of that for which he is being tried is irrelevant and prejudicial. People v. Pitts, 1 Ill.App.3d 120, 122, 273 N.E.2d 664; People v. Bryant, 1 Ill.App.3d 428, 431, 432, 274 N.E.2d 491.

The record also shows other misconduct by the prosecutor which we must necessarily classify as prejudicial. In closing arguments, the prosecutor accused counsel for defendant of



attempting to confuse the jury and also of attempting to trick them. Virtually the identical conduct has been condemned by the Supreme Court as inflammatory and prejudicial. People v. Freedman, 4 Ill.2d 414, 422, 123 N.E.2d 317.

In addition, also in closing argument, the prosecutor commented upon the absence of Lulu Edwards from the trial and indicated that she had absented herself. He also stated that Lulu Edwards "***almost got burned to death in that apartment ***." This argument was completely prejudicial. It attempted to bring home to the jury the seriousness of the fire and to theorize that it had almost resulted in the death of a person. This statement was more than "a slight exaggeration" as contended by the State. There was no evidence in the record that the lady in question had been almost burned to death. Comment by the prosecutor on facts not in evidence has universally been condemned as improper and unfair. (People v. Brown, 3 Ill.App. 3d 1022, 1025, 279 N.E.2d 765.) As held in Brown, this type of conduct may be reversible error even after an objection there-to has been made and sustained and the offending language stricken.

Upon consideration of these various trial errors, we conclude that the judgment appealed from should be reversed and the cause remanded for a new trial.

Judgment reversed; cause
remanded for a new trial.

BURKE, P.J., and EGAN, J., concur.

56855



ABST.

BETA ENGINEERING, INC., an)	
Illinois Corporation,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellant,	)	COURT OF COOK COUNTY.
)	
v.)	
)	
E. W. BLISS COMPANY, a	)	HONORABLE NATHAN KAPLAN,
foreign corporation,	)	Presiding.
)	
Defendant-Appellee.)	

MR. JUSTICE EGAN delivered the opinion of the court:

This is an appeal from an order of the circuit court of Cook County, vacating plaintiff's ex parte judgment, under Section 72 of the Civil Practice Act, (Ill.Rev.Stat. 1971, ch. 110, par. 72.) Beta Engineering Company, hereinafter called plaintiff, filed suit against E. W. Bliss Company, hereinafter called defendant, claiming it had furnished services in the amount of \$11,532.69. Defendant counter-claimed alleging unsatisfactory and unworkmanlike performance and claimed damages in the sum of \$15,062.00.

On May 5, 1971, the case was called for trial and assigned to Judge Nathan Kaplan. No one appeared for the defendant and an ex parte verdict was returned for plaintiff in the amount of \$11,532.69. On September 23, 1971, defendant presented a Section 72 petition to vacate the ex parte judgment of May 5, 1971. The petition alleged that he had conferred with the prior attorney for plaintiff and had agreed to try the case at a time convenient to both sides. He also corresponded with the plaintiff's present attorney and informed him that he wished to proceed with the counter-claim. He inquired five or six times at the clerk's office as to when the case would be set for trial and was told that he would be notified by mail. He received no notice of the



trial date by mail or phone from the clerk's office, the court or opposing counsel. No execution was taken on the judgment. No notice of the default was received from the clerk's office. He became aware of the default while checking his calendar and promptly filed the motion to vacate.

Plaintiff's attorney filed an answer alleging that he did not receive any notice of the court date, but followed the case in the Daily Municipal Record. Plaintiff's answer argued that it is the duty of each attorney to follow his case and there is no duty on the clerk, the court or opposing counsel to notify counsel of the trial date. The facts as alleged in the petition were not denied and must be taken as true. (Stidham v. Pappas, 78 Ill.App.2d 402, 223 N.E.2d 318.) Plaintiff now argues that the defendant's Section 72 petition should have been denied because the defendant did not set forth facts showing due diligence.

A petition under Section 72 to set aside a default judgment must set forth sufficient facts to show a meritorious defense and due diligence on the part of the petitioner. (Burkitt v. Downey, 102 Ill.App.2d 373, 242 N.E.2d 901.) Such a petition, however, is addressed to the equitable powers of the court, and only where there is an abuse of discretion will a reviewing court interfere. (Stackler v. Village of Skokie, 53 Ill.App.2d 417, 203 N.E.2d 183.) In Ellman v. DeRuiter, 412 Ill. 285, 106 N.E.2d 350, the court said:

Stated differently, it is our belief that the motion may, under our present practice, be addressed to the equitable powers of the court, when the exercise of such powers is necessary to prevent injustice.



We have held that a default should be entered only as a last resort and should be set aside where it will not cause a hardship to go to trial on the merits. Libert v. Turzynski, 129 Ill.App.2d 146, 262 N.E.2d 741.

In the present case the defense attorney had filed an answer and counter-claim seeking damages. He had conferred with prior counsel for plaintiff about the time of trial and had informed present counsel for plaintiff that he wished to proceed with the counter-claim. He had inquired five or six times as to when the case would be set for trial. Neither the clerk nor the court made any effort to inform him that the case was set for trial. Plaintiff's attorney, while obviously aware that the defendant was contesting the matter, made no attempt to phone his opponent, who he knew was available. Plaintiff made no attempt to execute on the judgment for over 30 days. (See Jansma Transport, Inc. v. Torino Baking Co., 27 Ill.App.2d 347, 354, 169 N.E.2d 829.) The defense attorney received no notice of the default from the clerk's office. Upon hearing of the default, the defense attorney promptly moved to vacate the judgment. Under all the circumstances presented here, we are persuaded that the trial court did not abuse its discretion by granting defendant's petition to vacate the default judgment.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. and GOLDBERG, J. concur.

MAY 1973



57096

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
JAMES L. VALIQUET,	)	Hon. Minor K. Wilson,
	)	Presiding.
Defendant-Appellant.)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

James L. Valiquet (defendant) was found guilty of burglary by a jury. (Ill.Rev.Stat. 1967, ch.38, par.19-1.) He was sentenced to three to ten years in the penitentiary and he appeals.

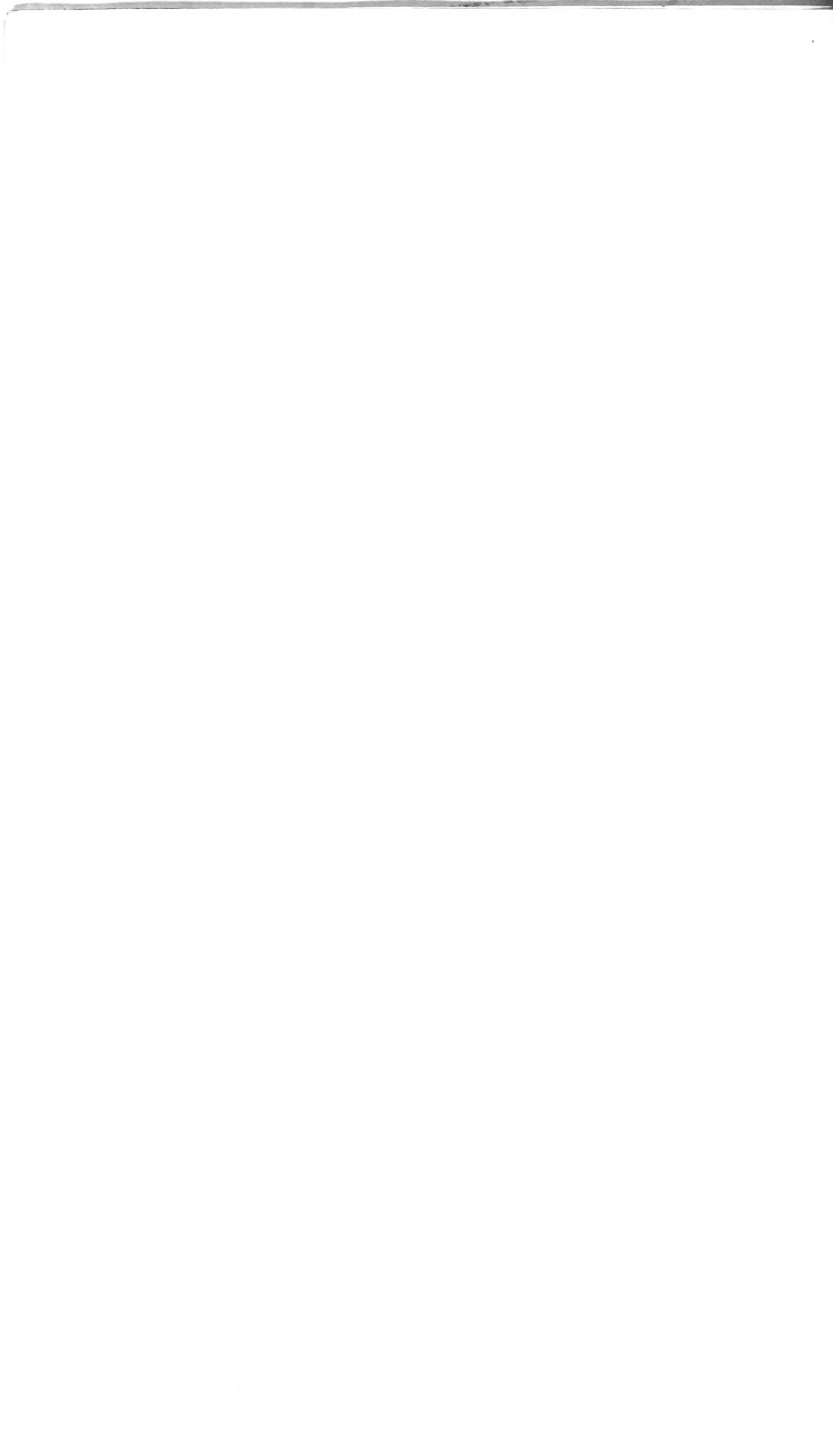
Defendant contends that the evidence failed to prove ownership of the burglarized premises as alleged in the indictment; statements made by him were received in evidence in violation of his constitutional rights; misconduct of the prosecutor combined with improper argument to the jury denied him a fair trial; the instructions were improper; and, finally, he received ineffective assistance of counsel.

Defendant makes no contention regarding sufficiency of the evidence to prove guilt beyond reasonable doubt. The testimony showed that at 5:00 a. m. police responded to a call of burglary in progress. They found a broken window at one side of the drug store in question. Upon entry, a police officer found merchandise strewn about on the floor and found defendant at the rear of the premises in a crouched position. Thereafter, under circumstances contested by defendant, which will hereinafter be related, defendant admitted to the police that he had broken the window with a concrete slab and entered the store.

Defendant did not testify in his own behalf and no evidence of any kind was offered in defense other than need of the defendant to take medicine to avoid a "seizure" that only lasted for a few minutes. The evidence is overwhelmingly sufficient to prove guilt beyond reasonable doubt.

The indictment alleged a burglary of the "***store of Harry Gandell and Max Gandell, co-partners doing business as Gandell & Gandell Drugs***." Max Gandell testified that he and his brother as partners owned the pharmacy. A police officer testified that the burglary took place and that he arrested defendant in "the drug store of Max and Harry Gandell." This evidence is sufficient to prove ownership beyond reasonable doubt. We find no variance and no failure of proof. In addition, this point was not raised by defendant at any time in the trial court prior to verdict or in his written motion for a new trial. The point is, therefore, waived and cannot be raised here. (People v. Nelson, 41 Ill.2d 364, 366, 243 N.E.2d 225. Also People v. Harris, 33 Ill.2d 389, 390, 211 N.E.2d 693.) Finally, this point has no legal merit. In People v. Rosario, 4 Ill.App.3d 642, 281 N.E.2d 714, this court discussed a similar matter at length and cited the authorities which serve to rebut it.

As regards constitutional violations, the evidence shows that a police officer arrested and handcuffed defendant. He then gave warnings to the defendant which counsel here claims were not sufficient. Defendant made no response. Thereafter when defendant and the police officer entered the squad car, the defendant stated that, "***he couldn't afford this pinch***." We regard this statement as purely voluntary, made by the defendant without any compelling influences and therefore



admissible. See People v. Ricketson, 129 Ill.App.2d 365, 377, 264 N.E.2d 220, quoting directly from Miranda to this effect.

At the police station, additional warnings were given to defendant which he now concedes were sufficient. A police officer testified that when defendant was asked what he was doing in the store, he responded, "What? You know why I was there. You have got my record." The officer also testified that when asked if he went into the store, defendant responded, "Yes." We find here no violation of constitutional rights but rather a frank admission of guilt under proper circumstances.

Defendant next urges that his rights were violated because the prosecutor informed the jury that he was a narcotics addict. In this situation, a police officer testified that after the warnings were given, defendant stated that he broke into the drug store looking for some "stuff." The officer also testified that defendant told him that he had been arrested previously and that he was now on parole for a prior burglary of the same drug store. Objection to this last statement was made by defendant's counsel and was sustained by the court. The jury was directed by the court to disregard it. We find no error in this situation. See People v. Rejno, 402 Ill. 84, 83 N.E.2d 327; also People v. Hurry, 385 Ill.486, 52 N.E.2d 173.

In this connection, defendant also urges error because the prosecutor insinuated that defendant was a narcotics addict. In view of the defendant's own statement that he broke into the drug store looking for "stuff" these insinuations or statements by the prosecutor are within the limits of fair comment upon the evidence before the jury. People v. Palmer, 47 Ill.2d 289, 298, 265 N.E.2d 627; People v. Hairston, 46 Ill.2d 348, 375, 263 N.E.2d 840; People v. Sinclair, 27 Ill.2d 505, 190 N.E.2d 298.

In final argument, the prosecutor asserted that the State's evidence was uncontradicted and further that the defense had offered no contrary testimony. Defendant's brief states that the prosecutor told the jury "****that defendant's guilt could be presumed by his failure to call as witnesses certain police officers." We find no such argument in the record. The prosecutor told the jury that the State and the defendant have the right to subpoena any and all witnesses. We find no error in the final arguments made by the prosecutor. A statement by the State's Attorney that the evidence has not been contradicted is not a reference to the failure of the defendant to testify, even if defendant was the only one who could have denied the State's testimony. (People v. Hopkins, 52 Ill. 2d 1, 6, 284 N.E.2d 283; People v. Palmer, 47 Ill.2d 289, 299, 265 N.E.2d 627.) In addition, we find no substantial prejudice to the defendant resulting from any final argument by the prosecutor. (People v. Nilsson, 44 Ill.2d 244, 248, 255 N.E.2d 432.) Furthermore, the evidence of guilt in this case is so overwhelming that we may say beyond reasonable doubt that the verdict would not have been different had any and all of the alleged improper closing arguments not been made. People v. Trice, 127 Ill.App.2d 310, 319, 262 N.E.2d 276.

Defendant finally urges that the court failed to instruct the jury properly. The instructions of the court defined the offense of burglary and used the word "theft." The court did not define theft to the jury. Defendant relies upon People v. Davis, 74 Ill.App.2d 450, 221 N.E.2d 63. The identical point based upon the same case was raised in People v. Gibson, _____ Ill.App.2d_____, 270 N.E.2d 110, (abstract opinion only, filed March 1, 1971, General No. 54039.) In substance, we held there that the Webster definition of theft shows it to be a word of

common usage so that, within the concept of the word as used in this burglary prosecution, further definition thereof was not only unnecessary but would be improper. We also cited People v. Stewart, 46 Ill.2d 125, 262 N.E.2d 911 where the Supreme Court refused to reverse a conviction by reason of a faulty instruction because of the overwhelming proof of guilt. We adhere to our opinion in Gibson.

Defendant finally urges that his own retained counsel was ineffective so as to deprive him of his constitutional rights. This contention is patently invalid. We do not find from this record that defendant's counsel was incompetent. The cases hold that there is no showing of incompetency unless the services of counsel amounted "***to no representation at all***." (People v. Riojas, 47 Ill.2d 47, 49-50, 265 N.E.2d 865.) In addition, the remaining element of this claim to error, entirely lacking here, is substantial prejudice to the defendant without which the outcome of the case would probably have been different. (People v. Newell, 48 Ill.2d 382, 387, 268 N.E.2d 17.) As above pointed out, there is no such showing in the case at bar.

We find no error in this record and the judgment is accordingly affirmed.

Judgment affirmed.

BURKE, P.J., and EGAN, J., concur.

ABST.



58198

MAR 1 1973

PEOPLE OF THE STATE OF ILLINOIS,) APPEAL FROM
Plaintiff-Appellee,))
vs.) CIRCUIT COURT
) COOK COUNTY.
LARRY WATKINS,)
Defendant-Appellant.) HON. JOHN J. CROWLEY,
Presiding.

MR. PRESIDING JUSTICE BURKE delivered the opinion of the court:

Larry Watkins, hereinafter called defendant, was charged with theft in violation of section 16-1 of the Criminal Code. Ill.Rev. Stat. 1971, ch. 38, par. 16-1. The public defender of Cook County was appointed to represent him. After a bench trial, the defendant was found guilty and sentenced to serve one year at the state farm in Vandalia, Illinois.

The defendant wished to appeal and the public defender was appointed to represent him. After examining the record, the public defender filed a petition in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, a brief in support of the petition has also been filed. The brief states, in effect, that an appeal in this case would be wholly frivolous and without merit. This court notified the defendant of the pending petition on December 5, 1972. The defendant was given until January 2, 1973, to file additional points in support of his appeal. He has not responded.

The petition and brief of the public defender allege that the only question which could be raised on appeal is whether the defendant was proven guilty beyond a reasonable doubt. At trial, William Melton, the victim, testified that on December 28, 1971, he was in a bar located at 37 South Pulaski, Chicago, Illinois. The defendant, whom Mr. Melton had previously seen in the area,

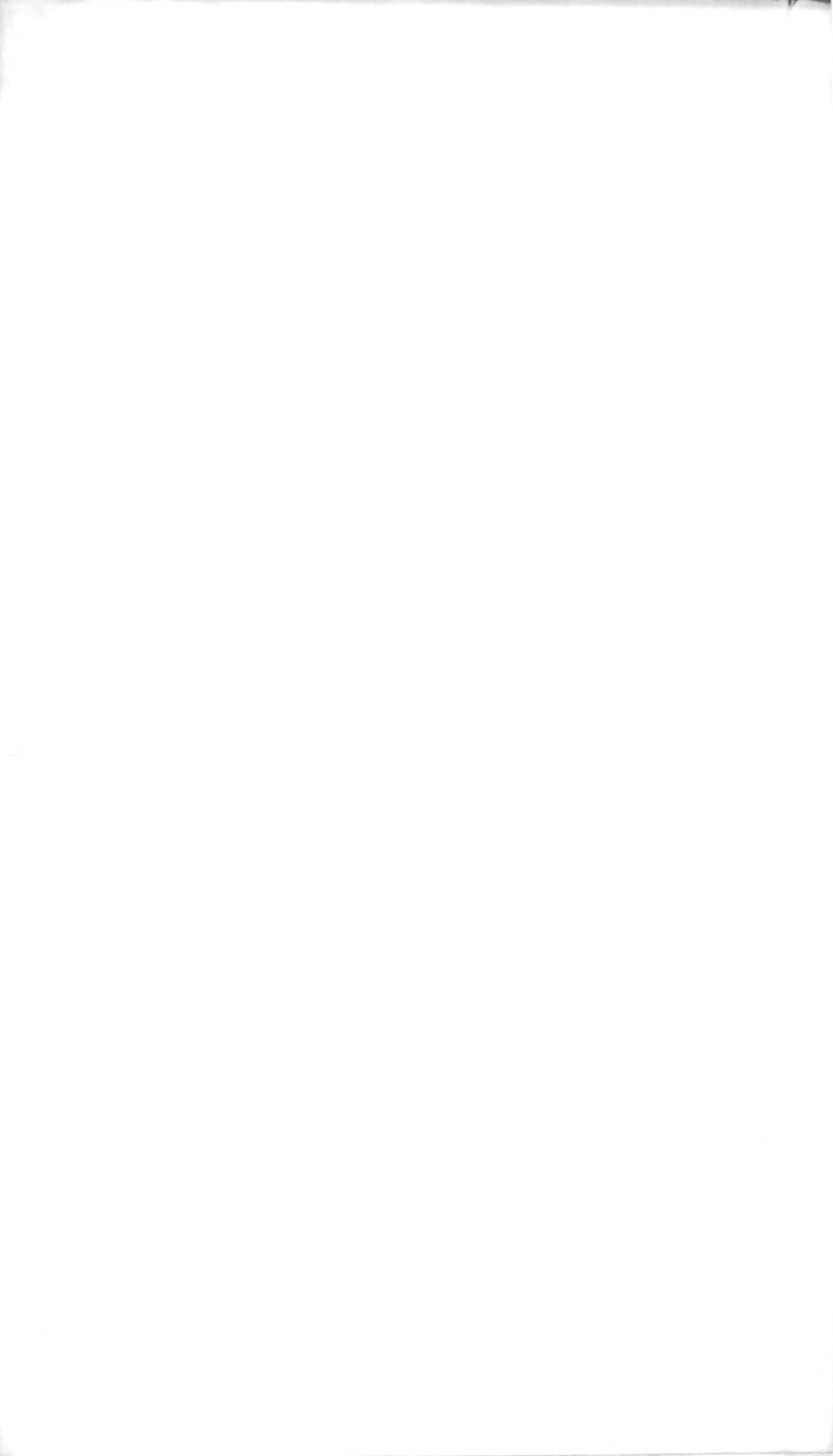
followed him into the washroom. The defendant then produced a revolver and took \$95.00 from Mr. Melton's pocket. Mr. Melton furnished the defendant's name to the police and positively identified him as the robber. The defendant denied taking Mr. Melton's money and stated that at the time of the robbery he was home with his girl friend, Bendeta Finley. She testified that at the time of the robbery she was with the defendant at his home.

The testimony of one witness alone, if positive and credible, is sufficient to convict, even if contradicted by the accused. People v. Guyton, 114 Ill.App.2d 394, 252 N.E.2d 665. It is the function of the trier of fact to determine the credibility of the witness, and its finding will not be disturbed unless the evidence is so unsatisfactory as to leave a reasonable doubt as to the defendant's guilt. People v. Airdo, 7 Ill.App.3d 1002, 288 N.E.2d 619. We have reviewed all of the evidence adduced at the trial and find it entirely sufficient to establish the defendant's guilt beyond a reasonable doubt. We are satisfied that the defendant was adequately represented by counsel and afforded full due process of law at all stages of the proceedings.

We agree with the public defender's assertion that any appeal would be wholly frivolous and without merit. The motion of counsel to withdraw is allowed and the judgment is affirmed.

JUDGMENT AFFIRMED.

GOLDBERG and EGAN, JJ., concur.







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